H.R. 3265, TO CREATE A SOCIAL SECURITY COURT OF APPEALS

ING

THE

SUBCOMMITTEE ON SOCIAL SECURITY

OF THE

COMMITTEE ON WAYS AND MEANS

HOUSE OF REPRESENTATIVES

ONE HUNDRED THIRD CONGRESS

FIRST SESSION

ON

H.R. 3265

TO AMEND TITLE 28, UNITED STATES CODE, AND THE SOCIAL SECURITY ACT WITH RESPECT TO THE ESTABLISHMENT AND JURISDICTION OF A UNITED STATES COURT OF APPEALS FOR THE SOCIAL SECURITY CIRCUIT

OCTOBER 21, 1993

Serial 103-51

Printed for the use of the Committee on Ways and Means

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H.R. 3265, TO CREATE A SOCIAL SECURITY COURT OF APPEALS

THURSDAY, OCTOBER 21, 1993

HOUSE OF REPRESENTATIVES,
COMMITTEE ON WAYS AND MEANS,
SUBCOMMITTEE ON SOCIAL SECURITY,
Washington, D.C.

The subcommittee met, pursuant to notice, at 10:03 a.m., in room B–318, Rayburn House Office Building, Hon. Andrew Jacobs, Jr. (chairman of the subcommittee) presiding.

[The press release announcing the hearing, and a copy of the bill, H.R. 3265, follow:]

FOR IMMEDIATE RELEASE
WEDNESDAY, OCTOBER 13, 1993

PRESS RELEASE #7
SUBCOMMITTEE ON SOCIAL SECURITY
COMMITTEE ON WAYS AND MEANS
U.S. HOUSE OF REPRESENTATIVES
1102 LONGWORTH HOUSE OFFICE BLDG.
WASHINGTON, D.C. 20515
TELEPHONE: (202) 225-9263

THE HONORABLE ANDY JACOBS, JR. (D., IND.), CHAIRMAN, SUBCOMMITTEE ON SOCIAL SECURITY, COMMITTEE ON WAYS AND MEANS, U.S. HOUSE OF REPRESENTATIVES, ANNOUNCES A HEARING ON H.R. 3265, TO CREATE A SOCIAL SECURITY COURT OF APPEALS

The Honorable Andy Jacobs, Jr. (D., Ind.), Chairman, Subcommittee on Social Security, Committee on Ways and Means, U.S. House of Representatives, announced today that the Subcommittee will hold a hearing on H.R. 3265, which would establish a Federal Social Security Court of Appeals to adjudicate Social Security claims appealed from Federal district courts. The hearing will be held on Thursday, October 21, 1993, in B-318 Rayburn House Office Building, beginning at 10:00 a.m.

BACKGROUND:

The past decade has witnessed increasing regional variation in the standards of eligibility used by the Social Security Administration (SSA) to evaluate applications for disability benefits. A significant cause of this variation is the Federal courts' increasing role in reviewing SSA decisions and interpreting agency regulations. Court intervention has been, and continues to be, vitally important in protecting the rights of claimants. However, the regional nature of court jurisdiction has also served to fragment Social Security disability standards along geographic lines. Some observers warn that, if unaddressed, this fragmentation could erode the national character of the Social Security disability program and institutionalize disparities in treatment of similarly situated claimants.

FOCUS OF THE HEARING:

The hearing will focus on H.R. 3265, which would establish a single, national Social Security Court of Appeals. This court would be modeled after the court of appeals for the Federal circuit, whose jurisdiction includes appeals for patent and trademark law, international trade, and the Court of Claims. The new court would replace the 12 Federal circuit courts of appeal in adjudicating Social Security and Supplemental Security Income (SSI) benefit appeals from Federal district courts. The court would consist of five judges with lifetime appointments. It would render appeal decisions in panels of three judges, as is the case at present with Federal circuit courts of appeal. The new court would be located in Washington, D.C., and would have authority to travel as it deemed necessary. As the single body to adjudicate Social Security and SSI appeals from Federal district court, this Court would be positioned to articulate a consistent body of case law and to eliminate regional discrepancies in SSA policy.

Claimants' right to appeal SSA decisions to Federal district courts would be unaffected by H.R. 3265. Moreover, decisions of the Social Security Court of Appeals would be appealable to the U.S. Supreme Court, just as Social Security decisions by the circuit courts of appeal are under current law.

DETAILS FOR SUBMISSION OF REQUESTS TO BE HEARD:

Requests to be heard at the hearing must be made by telephone to Harriett Lawler, Diane Kirkland or Karen Ponzurick [(202) 225-1721] no later than close of business Monday, October 18, 1993. The telephone request should be followed by a formal written request addressed to Janice Mays, Chief Counsel and Staff Director, Committee on Ways and Means, U.S. House of Representatives, 1102 Longworth House Office Building, Washington, D.C. 20515. The Subcommittee staff will notify by

(MORE)

telephone those scheduled to appear as soon as possible after the filing deadline. Any questions concerning scheduled appearances should be directed to the Subcommittee staff [(202) 225-9263].

In view of the limited time available to hear witnesses, the Subcommittee may not be able to accommodate all requests to be heard. Those persons and organizations not scheduled for an oral appearance are encouraged to submit written statements for the record of the hearing. All persons requesting to be heard, whether they are scheduled for oral testimony or not, will be notified as soon as possible after the filing deadline.

Witnesses scheduled to present oral testimony are required to summarize briefly their written statements in no more than minutes. THE FIVE MINUTE RULE WILL BE STRICTLY ENFORCED. The Congressional Budget Office and similar U.S. Government agencies may be granted an exception. The full written statement of each witness will be included in the printed record.

In order to assure the most productive use of the limited amount of time available to question witnesses, all witnesses scheduled to appear before the Subcommittee are required to submit 150 copies of their prepared statements to the Subcommittee on Social Security office, room B-316 Rayburn House Office Building, at least 48 hours in advance of their scheduled appearance. Failure to do so may result in the witness being denied the opportunity to testify in person.

WRITTEN STATEMENTS IN LIEU OF PERSONAL APPEARANCE:

Any persons or organizations wishing to submit a written statement for the printed record of the hearing should submit at least six (6) copies of their statements by the close of business, Thursday, November 4, 1993, to Janice Mays, Chief Counsel and Staff Director, Committee on Ways and Means, U.S. House of Representatives, 1102 Longworth House Office Building, Washington, D.C. 20515. If those filing written statements wish to have their statements distributed to the press and interested public at the hearing, they may deliver 150 additional copies for this purpose to the Subcommittee office, room B-316 Rayburn House Office Building, before the hearing begins.

FORMATTING REQUIREMENTS:

Each statement presented for printing to the Committee by a witness, any written statement or exhibit submitted for the printed record or any written comments in response to a request for written comments must conform to the guidelines listed below. Any statement or exhibit not in compliance with these guidelines will not be printed, but will be maintained in the Committee files for review and use by the Committee.

1. All statements and any accompanying exhibits for printing must be typed in single space on legal-size paper and may not exceed a total of 10 pages.

2. Copies of whole documents submitted as exhibit material will not be accepted for printing. Instead, exhibit material should be referenced and quoted or paraphrased. All exhibit material not meeting these specifications will be maintained in the Committee files for review and use by the Committee.

3. Statements must contain the name and capacity in which the witness will appear or, for written comments, the name and capacity of the person submitting the statement, as well as any clients or persons, or any organization for whom the witness appears or for whom the statement is submitted.

4. A supplemental sheet must accompany each statement listing the name, full address, a telephone number where the witness or the designated representative may be reached and a topical outline or summary of the comments and recommendations in the full statement. This supplemental sheet will not be included in the printed record.

The above restrictions and limitations apply only to material being submitted for printing. Statements and exhibits or supplementary material submitted solely for distribution to the Members, the press and the public during the course of a public hearing may be submitted in other forms.

I

103D CONGRESS
1ST SESSION

H. R. 3265

To amend title 28, United States Code, and the Social Security Act with respect to the establishment and jurisdiction of a United States Court of Appeals for the Social Security Circuit.

IN THE HOUSE OF REPRESENTATIVES

OCTOBER 13, 1993

Mr. JACOBS (for himself and Mr. BUNNING) introduced the following bill; which was referred jointly to the Committees on the Judiciary and Ways Means

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A BILL

To amend title 28, United States Code, and the Social Security Act with respect to the establishment and jurisdiction of a United States Court of Appeals for the Social Security Circuit.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled,

SECTION 1. SHORT TITLE.

This Act may be cited as the "Social Security Court of Appeals Act".

SEC. 2. ESTABLISHMENT OF COURT OF APPEALS FOR THE SOCIAL SECURITY CIRCUIT.

(a) NUMBER AND COMPOSITION OF CIRCUITS.—Section 41 of title 28, United States Code, is amended—

(1) by striking "thirteen" and inserting "fourteen"; and

(2) by adding at the end of the table contained therein the following:

"Social Security	All Federal judicial districts.".

(b) NUMBER AND RESIDENCE OF CIRCUIT JUDGES.—(1) Section 44(a) of title 28, United States Code, is amended by adding at the end of the table contained therein the following:

"Social Security	5.".

(2) Section 44(c) of title 28, United States Code, is amended by adding at the end the following: "While in active service, each circuit judge of the Social Security judicial circuit shall reside within fifty miles of the District of Columbia.".

(c) TERMS OF COURT.—(1) Section 48(a) of title 28, United States Code, is amended by adding at the end of the table contained therein the following:

"Social Security	District of Columbia, and in any other place listed above as the court directs.".

(2) Section 48(d) of title 28, United States Code, is amended by inserting "and of the Court of Appeals for the Social Security Circuit" after "Federal Circuit".

SEC. 3. JURISDICTION.

(a) FINAL DECISIONS OF DISTRICT COURTS.—Section 1291 of title 28, United States Code, is amended—

(1) in the first sentence by inserting "and the United States Court of Appeals for the Social Security Circuit" after "Federal Circuit"; and

(2) by adding at the end the following: "The jurisdiction of the United States Court of Appeals for the Social Security Circuit shall be limited to the jurisdiction described in subsections (b) and (e) of section 1292 and section 1296 of this title.".

(b) INTERLOCUTORY DECISIONS.—Section 1292 of title 28, United States Code, is amended—

(1) in subsection (a) in the matter preceding paragraph (1) by striking "and (d)" and inserting "(d), and (e)";

(2) in subsection (e)—

(A) by redesignating such subsection as subsection (f); and

(B) by striking "or (d)" and inserting "(d), or (e)"; and

(3) by inserting after subsection (d) the following:

"(e) The United States Court of Appeals for the Social Security Circuit shall have exclusive jurisdiction of an appeal from an interlocutory order or decree described in subsection (a) of this section in any case over which the court would have jurisdiction of an appeal under section 1296 of this title.".

(c) CIRCUITS IN WHICH DECISIONS ARE REVIEWABLE.—Section 1294 of title 28, United States Code, is amended by striking "and 1295" and inserting "1292(e), 1295, and 1296".

(d) GENERAL JURISDICTION.—(1) Chapter 83 of title 28, United States Code, is amended by adding at the end the following new section:

"§ 1296. Jurisdiction of the United States Court of Appeals for the Social Security Circuit

"The United States Court of Appeals for the Social Security Circuit shall have exclusive jurisdiction of an appeal from a final decision of a district court of the United States, the District Court of Guam, the District Court of the Virgin Islands, or the District Court for the Northern Mariana Islands, on a determination of the Secretary of Health and Human Services under title II or XVI of the

Social Security Act that is subject to judicial review as provided in section 205(g) of that Act.".

(2) The table of sections at the beginning of chapter 83 of title 5, United States Code, is amended by adding at the end the following:

"1296. Jurisdiction of the United States Court of Appeals for the Social Security Circuit.".

(e) AMENDMENT TO THE SOCIAL SECURITY ACT.—Section 205(g) of the Social Security Act (42 U.S.C. 405(g)) is amended by striking "The judgment of the court shall be final except that it shall be subject to judicial review in the same manner as a judgment in other civil actions." and inserting "The judgment of the court shall be final except that it may be appealed to the United States Court of Appeals for the Social Security Circuit under chapter 83 of title 28, United States Code.".

SEC. 4. ADMINISTRATIVE MATTERS.

(a) JUDICIAL DISCIPLINE.—Section 372(c)(18) of title 28, United States Code, is amended by striking "and the Court of Appeals for the Federal Circuit" and inserting "the Court of Appeals for the Federal Circuit, and the Court of Appeals for the Social Security Circuit".

(b) OFFICIAL DUTY STATION.—Section 456(b) of title 28, United States Code, is amended by inserting "the United States Court of Appeals for the Social Security Circuit," after "Federal Circuit,".

(c) COURT ACCOMMODATIONS.—Section 462(d) of title 28, United States Code, is amended by inserting ", for the United States Court of Appeals for the Social Security Circuit," after "Federal Circuit".

(d) TRANSMISSION OF PETITIONS.—(1) Section 520 of title 28, United States Code, is amended—

(A) in subsection (a) by striking "Claims Court or in the United States Court of Appeals for the Federal Circuit" and inserting "Court of Federal Claims, in the United States Court of Appeals for the Federal Circuit, or in the United States Court of Appeals for the Social Security Circuit"; and

(B) by amending the section heading to read as follows:

"§ 520. Transmission of petitions in United States Court of Federal Claims, in the United States Court of Appeals for the Federal Circuit, or in the United States Court of Appeals for the Social Security Circuit; statement furnished by departments".

(2) The item relating to section 520 in the table of sections at the beginning of chapter 31 of title 28, United States Code, is amended to read as follows:

"520. Transmission of petitions in United States Court of Federal Claims in the United States Court of Appeals for the Federal Circuit, or in the United States Court of Appeals for the Social Security Circuit; statement furnished by departments.".

(e) BUDGET ESTIMATES.—Section 605 of title 28, United States Code, is amended in the second undesignated paragraph—

(1) by striking "such court and" and inserting "such court,"; and

(2) by inserting before the period at the end the following: ", and the estimate with respect to the United States Court of Appeals for the Social Security Circuit shall be approved by such court".

SEC. 5. OTHER CONFORMING AMENDMENTS.

(a) REVIEW OF AGENCY ORDERS.—Section 2342 of title 28, United States Code, is amended by inserting "and the United States Court of Appeals for the Social Security Circuit" after "Federal Circuit".

(b) INTERNAL REVENUE CODE.—Section 7482(a)(1) of the Internal Revenue Code of 1986 (26 U.S.C. 7482(a)(1)) is amended by inserting "and the United States Court of Appeals for the Social Security Circuit" after "Federal Circuit".

SEC. 6. EFFECTIVE DATE.

(a) IN GENERAL.—This Act and the amendments made by this Act shall take effect 180 days after the date of the enactment of this Act.

(b) APPLICABILITY.—The amendments made by this Act shall apply with respect to any appeal of an interlocu-

tory order or of a decision of a district court that is filed on or after the effective date of this Act.

○

Chairman JACOBS. I think we might as well start. Mr. Archer is not yet here, but I am sure he will be.

Why don't we go to the second witness, Mr. Gonya, who is Chief Counsel for Social Security in the U.S. Department of Health and Human Services. Sir, if you would just proceed in your own way.

Without objection, and how could there be any, we will include Mr. Bunning's opening statement on the matter in the record at this point.

[The opening statement of Mr. Bunning follows:]

OPENING STATEMENT BY
THE HONORABLE JIM BUNNING
SOCIAL SECURITY SUBCOMMITTEE HEARING
OCTOBER 21, 1993

MR. CHAIRMAN, I WELCOME THE OPPORTUNITY FOR THIS HEARING AND THE OPPORTUNITY TO JOIN YOU AS THE ORIGINAL COSPONSOR OF H.R. 3265 WHICH WOULD CREATE A SOCIAL SECURITY CIRCUIT COURT OF APPEALS.

WE HAVE A PROBLEM. SOCIAL SECURITY IS A NATIONAL PROGRAM. YET, BASED ON THE ACCEPTED CONGRESSIONAL INTENT OF THE DISABILITY BENEFITS REFORM ACT OF 1984, THE SOCIAL SECURITY ADMINISTRATION IS REQUIRED TO ACCEPT CIRCUIT COURT OPINIONS AS PRECEDENT WITHIN THAT PARTICULAR CIRCUIT.

THIS MEANS THAT, THEORETICALLY, WE COULD HAVE ELEVEN DIFFERENT SETS OF STANDARDS, RULES AND CASE LAW FOR SOCIAL SECURITY AND SOCIAL SECURITY DISABILITY CASES DEPENDING ON WHAT CIRCUIT YOU HAPPEN TO BE IN.

THAT'S JUST NOT RIGHT. THESE ARE NATIONAL PROGRAMS AND THERE SHOULD BE A SINGLE STANDARD.

AT LAST COUNT, AND I UNDERSTAND CRS DID THE COUNT FOR US, SSA IS ADMINISTERING ABOUT 50 ACQUIESCENCE RULINGS--RULINGS THAT ARE VARIATIONS ON SPECIFIC STANDARDS IN THE DIFFERENT FEDERAL CIRCUITS. THIS IS JUST NO WAY TO ADMINISTER A FEDERAL PROGRAM.

AS I UNDERSTAND IT, THE CONCEPT OF A SOCIAL SECURITY COURT IS NOT A NEW ONE. TWO OF OUR COLLEGUES, THE FORMER CHAIRMAN OF THIS SUBCOMMITTEE JAKE PICKLE AND OUR RANKING MINORITY MEMBER, MR. ARCHER HAVE INTRODUCED SIMILAR BILLS. OUR BILL ADDRESSES THE ISSUE FROM THE TOP. OUR BILL WOULD REPLACE THE MULTIPLE CIRCUIT COURTS' JURISDICTION OVER SOCIAL SECURITY CASES WITH ONE SOCIAL SECURITY CIRCUIT COURT OF APPEALS. WHILE ITS DETERMINATION, WOULD BE BINDING, UNLESS, OF COURSE, THEIR RULING WAS OVERTURNED BY THE SUPREME COURT, THE AGENCY WOULD HAVE ONLY ONE INTERPRETATION OF THE LAW TO ADMINISTER.

I APPRECIATE THE FACT THAT SOME ADVOCATES FOR THE DISABLED PREFER THE CURRENT ABILITY TO "SHOP" AMONG CIRCUITS. BUT WE SIMPLY CAN'T IGNORE THE FACT THAT THIS FRAGMENTS NATIONAL STANDARDS, AND ADDS TREMENDOUSLY TO THE ADMINISTRATIVE COSTS OF ADMINISTERING THE PROGRAM. WE ARE WASTING ADMINISTRATIVE RESOURCES THAT COULD BE BETTER USED FOR INITIAL CLAIMS PROCESSING OR FOR THE SADLY NEGLECTED CONTINUING DISABILITY REVIEWS.

I KNOW THAT OTHERS WILL OBJECT TO THE FURTHER SPECIALIZATION OF THE FEDERAL COURTS. BUT, I FIND JUDGE SCALIA PERSUASIVE ON THE SUBJECT. IN 1987, HE RECOMMENDED THAT THE DECISION OF THE ALJ BE FINAL, UNLESS A LEGAL ISSUE WAS RAISED, OR THAT CONGRESS CREATE A SOCIAL SECURITY COURT TO ALLEVIATE BACKLOGS. I THINK WITNESSES TODAY SHOULD KEEP THAT OPTION IN MIND. WE NEED TO GUARANTEE PEOPLE THE RIGHT TO APPEAL DECISIONS BUT AT THE SAME TIME, WE MUST GIVE SSA A FIGHTING CHANCE TO ADMINISTER THE RESULTS IN A MANNER CONSISTENT WITH A NATIONAL POLICY.

I WANT TO THANK TODAY'S WITNESSES AND LOOK FORWARD TO THEIR CONTRIBUTION TO TODAY'S HEARING. I BELIEVE IT IS IMPORTANT THAT WE GO FORWARD WITH THIS LEGISLATION.

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Chairman JACOBS. Mr. Gonya, will you proceed in your own manner?

STATEMENT OF DONALD A. GONYA, CHIEF COUNSEL FOR SOCIAL SECURITY, U.S. DEPARTMENT OF HEALTH AND HUMAN SERVICES

Mr. GONYA. Mr. Chairman, thank you. I appreciate the opportunity to join you today to discuss your bill, H.R. 3265.

With your approval, Mr. Chairman, I would like to submit my full written statement for the record and then make these brief opening comments before answering any of your questions.

Chairman JACOBS. Without objection.

Mr. GONYA. I would like to share with you two factors that will limit the extent of my comments here this morning. First, since H.R. 3265 was introduced just last week, we have not yet had the opportunity to fully analyze the bill and how it might impact on the Social Security and SSI programs.

Second, there are a number of judicial issues presented by your bill which would be appropriate, I believe, for Department of Justice consideration, and we would want to consult with that agency about such matters.

My written statement, Mr. Chairman, focuses on a preliminary assessment of some of the foreseeable impacts that we see presented by your bill on the Social Security and SSI appeals process. However, as we are discussing the bill here this morning, let me make a couple of general observations about the bill.

Social Security, as you know, is a national program, and therefore, policies should be applied uniformly. Your bill, Mr. Chairman, I believe fosters that value.

Also, H.R. 3265 seems to offer the potential for having cases decided more quickly at the appeals court level. Depending upon resources and logistics, a Social Security Appeals Court might be an approach for shortening the time it takes for a claimant to receive a decision.

Having said that, Mr. Chairman, allow me to share with you two concerns we have at this time about H.R. 3265. While greater uniformity in decisionmaking may result from a single Social Security Court at the circuit level, the creation of such a court would eliminate the percolation of ideas that presently occurs through review by the various circuit courts that now exist.

Also, locating the court in the District of Columbia might be perceived as making the court less accessible to claimants than the current system of 12 circuit courts now available in different parts of the country. If there is increased travel by the court itself to different locations, or if there is increased travel by the parties to the appeal, inconvenience and some delay could result.

We want to work with you, Mr. Chairman, as well as with your colleagues in the Congress, as well as with the Department of Justice, to pursue what I am sure is a joint goal of attaining greater uniformity of decisions in the Social Security and SSI programs.

I might also say that I think the bill comes at an opportune time. The agency has just begun work on an effort to reengineer the way it administers the disability programs under Social Security and SSI. Congressional consideration of possible changes in the judicial

review process, in my mind, is certainly a relevant and very important issue.

Because the overwhelming number of claims appealed to the Federal courts are, as you know, disability related, we look forward to working with you, to make this process as fair and as efficient as it can be.

I will be pleased to answer any questions that you may have.

[The prepared statement follows:]

TESTIMONY OF
DONALD A. GONYA
CHIEF COUNSEL FOR SOCIAL SECURITY
U.S. DEPARTMENT OF HEALTH AND HUMAN SERVICES

Mr. Chairman and Members of the Subcommittee:

I am pleased to be here today to discuss your bill --H.R. 3265--which would establish a Federal Social Security Court of Appeals to decide Social Security and Supplemental Security Income (SSI) determinations that are appealed from Federal district courts.

Mr. Chairman, your bill is very timely. Just this month, the Social Security Administration (SSA) began work on an effort to "reengineer" the way it administers the disability program under Social Security and SSI. Considering possible changes in appeals to Federal courts, such as in your bill, is pertinent because the disability program accounts for the overwhelming majority of Social Security and SSI cases appealed to the Federal courts.

SSA's reengineering effort will examine all aspects of its administration of the disability program, including ways to improve the administrative appeals process, which, in recent years, has been faced with an increase in the number of claims filed. Thus, while SSA focuses on improving its administrative decisionmaking appeals process, it seems appropriate for Congress to look at the way the court process is working.

Having said that, Mr. Chairman, let me state at the outset that we have not had a full opportunity, since H.R. 3265 was introduced last week, to analyze completely all the potential consequences of your bill. Moreover, there are a number of judicial issues which should be analyzed by the Department of Justice, and we would want to work closely with that Agency on such matters. Therefore, my testimony today will focus on a preliminary assessment of some foreseeable impacts this bill may have on the Social Security and SSI appeals process.

Let me lay the foundation for my discussion of H.R. 3265 by beginning with some general information about the current appeals process at both the administrative and court levels.

Background

There are three administrative levels of appeal for people filing Social Security or SSI claims--reconsideration, Administrative Law Judge (ALJ) hearing, and Appeals Council review. In simple terms, this means that a person who has been denied Social Security or SSI benefits at the initial determination level may request a review--called a reconsideration--of the claim. A person who disagrees with the reconsideration determination may then ask for a hearing before an ALJ. A person who disagrees with the ALJ's decision may request a review by the Appeals Council of the SSA Office of Hearings and Appeals.

While a request for review by the Appeals Council is the last step in the administrative process, a person who is dissatisfied with the final administrative decision may pursue the claim by filing a civil action in the appropriate United States District Court. The district court's decision is appealable to the appropriate United States Circuit Court, and review may even be further sought in the United States Supreme Court.

As I mentioned a few moments ago, Mr. Chairman, the overwhelming majority--98 percent--of Social Security cases which are appealed to the Federal courts are disability cases. And, recently there has been an unprecedented increase in the number of Social Security disability insurance (SSDI) and SSI disability claims filed with SSA. In fact, over the past three years, the

number of SSDI and SSI disability claims filed has increased by about 40 percent. This increase has strained SSA's ability to keep pace with the work, and is one reason that SSA is now seeking to reengineer its administration of the disability programs.

As one might expect, the increase in the number of claims filed has been mirrored by an increase in the number of claims appealed in our administrative process. For example, while we do not yet have the final numbers for fiscal year (FY) 1993, about 374,000 decisions were issued by ALJs and about 71,000 appeal requests were reviewed by the Appeals Council compared to about 357,000 and 62,000 respectively in FY 1992. Of course the total number of cases that are appealed to the Federal courts is much smaller by comparison. In FY 1992, of the about 8,000 cases originally filed in Federal district court, there were about 4,500 decisions on Social Security and SSI cases issued by the Federal district courts and about 380 decisions issued by Federal Circuit Courts of Appeal. However, the number of court cases already has gone up and in light of the increases in the number of administrative appeals, it will likely go even higher.

H.R. 3265

Mr. Chairman, let me now turn to the specifics of your bill, H.R. 3265. As I mentioned earlier, we would appreciate the opportunity to examine fully the issues raised by your bill. We support your goal of seeking to maintain uniform standards for evaluation of claims for Social Security and SSI disability benefits. For a nationwide program, policies should be applied uniformly. Your bill fosters that value.

In addition, your bill offers the potential for having cases decided quickly at the appeals court level. Depending upon resources and logistics, a Social Security court--such as the one proposed in your bill--might be an approach for shortening the time people wait to get a decision on their appeal. I think that the Department of Justice could be very helpful in determining the conditions under which a Federal Social Security court of appeals could be most beneficial in terms of expeditious decisionmaking.

On the other hand, we also need to look at all the potential consequences of having one specialized court of appeals handle Social Security and SSI cases which are now appealed to the circuit courts. Let me mention a few of our concerns. While there may be some advantage in terms of improved uniformity, having a single court at the circuit level could be more costly and, because of the subject matter of the cases, might also limit ability to recruit the caliber of judges currently attracted to the Federal courts.

We also have some concern that your bill would eliminate the "percolation" of ideas through the various circuits before review of an issue might be sought in the United States Supreme Court. Thus, some judicial and policy issues might not be developed as completely in a single court as they are now, when they are often decided in various circuits across the country.

Finally, locating the court in the District of Columbia might be perceived as making the court less accessible to claimants than the current system of having 12 circuit courts in various locations throughout the country hearing such appeals. Increased travel by the court itself or by the parties to an appeal could result in inconvenience and delays.

Conclusion

In closing, Mr. Chairman, let me commend you for holding this hearing, and for offering your bill to improve the uniformity of decisions in the Social Security and SSI programs. I can assure you that SSA stands ready to work with you and the other members of Congress, as well as the Department of Justice, to ensure that any changes to the appellate process help us attain the goal we share--to better serve the American public.

Chairman JACOBS. Thank you, Mr. Gonya.

Mr. Houghton.

Mr. HOUGHTON. I have no questions.

Chairman JACOBS. The two caveats that you stated are very thoughtful and appreciated. With regard to the first, I am not quite sure that the variety of ideas and contributions to thinking wouldn't be available to a Washington-based court. We certainly have precedent for the Washington-based circuit court of appeals in patents and so on.

Mr. GONYA. Absolutely.

Chairman JACOBS. I suppose if it were a danger here, it would have been a danger there. I think it is a thoughtful academic consideration and ought to be recognized.

The other caveat about the travel I think is a little more serious. When I practiced law, if I had a case in the circuit court of appeals, I had to go from Indianapolis to Chicago, for example. My point is that a great number of litigants and their counsels now travel to circuit court seats.

With modern travel, with the jet airlines, the difference between going from, for example, where I come from, Indianapolis, to Chicago and going to Washington is it is a little easier to go to Washington, even though the distance is greater, because of the congestion in the Chicago hub.

However, that is something that I think that Members of Congress ought to give a lot of thought to, also, in terms of looking before you leap.

You know that I, at least, believe that the greater problem is the disparity of treatment of claimants in the various circuits across the country.

I don't know if you can glean a question from this. It is almost like one of those Senate questions that never has a question mark, and I am really only giving you, I guess, my response to your caveats.

You rightly point out that this is a Justice Department matter, probably more than an HHS matter, and it is certainly a Judiciary Committee matter more than it is a Ways and Means Committee matter. We are talking about pretty big stuff here, and mostly in the jurisdiction of the Judiciary Committee.

We are pleased to have your testimony, because the other side of the coin is that the general judiciary is not as conversant with the subject as those such as yourself who specialize in it.

I might ask you one other question, a caveat that I anticipate that you did not enunciate, and that is that the specialized court might become stale. I suppose in a sense you meant that in referring to the importance of various ideas from judges.

Here is my question, though. Don't you think there is something to be said in criticism of a court of general jurisdiction, where the judges deal only occasionally or only partially with a fairly complicated subject, as I believe disability under Social Security to be. Isn't it true that the quality of that decision, when 5,000 other things are on the minds of the judges, might not be so great as for those who specialize in the subject?

Would you care to comment?

Mr. GONYA. Certainly that is a concern that has been articulated by others in the past, and as we all know, the idea of a specialized court is not a particularly new one. I think it goes back at least to the early bills introduced maybe about 1977. I have heard those views expressed previously.

I don't know that I would put it under the category necessarily of a criticism. Some may see some virtue in judges functioning as generalists. I don't know that there is a good or right and wrong answer, but I think, again, that certainly is an aspect of it, that working with your committee everyone would need to seriously consider.

Chairman JACOBS. An analogy that comes to my mind was that when I finished law school, I had my choice of joining a large firm and having instant income or striking out on my own in the general practice. I chose to starve, because it seemed like it would be more fun. But for the people who specialize in the practice of law, it is like rolling off a log. It is just one more case they know how to do, and they do it quickly. In the case of the generalist, you have to reeducate yourself for each case, and that brings the fun to a feather edge, in a sense.

I think that is another analogy. It is a trend that certainly is happening, legal specialization on the practitioner's side, and I suppose that if there is anything to be said for that trend, it might also apply by analogy to the judicial side as well.

Thank you very much, Mr. Gonya, for joining us this morning.

Mr. GONYA. I appreciate the opportunity.

Chairman JACOBS. Would you hold on just a second? Mr. Bunning is here.

Mr. BUNNING. Go right ahead.

Chairman JACOBS. You get to go.

Mr. Archer is not here, so next we have Mr. Arner of Kensington, Md., a citizen of the United States and author of "A Model Structure for the Social Security Administration." I don't know whether Mr. Arner has had any experience in the area of Social Security or whether he even is a qualified beneficiary, but he apparently is a citizen of the United States since he is a citizen of Kensington, Md.

From the Administrative Conference of the United States, Mr. Edles is general counsel. I assume you are a citizen also.

Mr. EDLES. Indeed.

Chairman JACOBS. Mr. Arner.

Mr. ARNER. You are absolutely correct, Mr. Chairman. This is the first time I have ever testified before a congressional committee, and I liked it much better being on the other side, where I could smirk at the witnesses.

Chairman JACOBS. What kind of deference do you normally feel toward the ranking Republican member of the U.S. House Ways and Means Committee, Mr. Arner? Have you had any experience with deference in that regard?

Mr. ARNER. What was that again, sir?

Chairman JACOBS. If you will look to your left and think to your right, you will find that Mr. Archer has just arrived.

[Laughter.]

Chairman JACOBS. If you would be so kind as to yield to Mr. Archer, I think he would be more than appreciative. He might make you a full citizen before the session is over.

Bill.

STATEMENT OF HON. BILL ARCHER, A REPRESENTATIVE IN CONGRESS FROM THE STATE OF TEXAS

Mr. ARCHER. Mr. Chairman, I apologize for being a couple of minutes late, and I am particularly grateful to my friend, Fred Arner, for yielding to me. It is a real privilege for me to sit next to him, one of the great experts on Social Security over the years and very level headed in his approach to Social Security.

It is also a pleasure for me to be back here before the Subcommittee on Social Security, where I have spent many, many hours of my own life in previous years.

I would like to commend you, Mr. Chairman, you who are my very good friend, and Mr. Bunning, who is also my very good friend, for your bipartisan leadership on the issue of a Social Security Court of Appeals. I suspect that my other very good friend, Amo Houghton, is going to be supportive of this reform, which I believe is extremely important.

I know from past experience you are going to hear from critics on this. You never do anything, you never move in any direction without someone saying, "Wait a minute, you shouldn't do this." There are some arguments that can be made against this, but in my view, it is absolutely vital that we regain control of this national program.

A constituent in Texas, Indiana, Kentucky, or New York should be evaluated under the very same standard, and that is not occurring today because the law is being interpreted differently in different areas.

Your bill, H.R. 3265, differs from my bill, the Procedural Improvement Act of 1993. My bill would substitute a specialized Social Security Court like the Tax Court for the district court review and channel appeals from the new court to the Federal Circuit Court of Appeals. The reason that I designed my bill that way is because many of the district courts are completely overloaded today and have probably a lesser interest in Social Security than the more dominant, highly publicized cases that might involve drugs or many other things.

Your bill would retain the district court review and channel appeals to the new Social Security Circuit Court of Appeals. It is slightly different in approach, but I can support either approach as long as SSA then administers one decision that affects the entire country.

SSA has acquiesced, has had to go along with diverse decisions, diverse standards, 7 times on the issue of ability to engage in prior work, twice on the issue of substantial gainful activity, and a mind-boggling 10 times on the computation of offsets involving workers' compensation. Not only do medical standards vary by circuit, but also the amount of the benefits.

As before, my bill would eliminate the final appeal to the Appeals Council and relax the standards for the Federalization of State agencies. I think all three of you understand that I am not

a big advocate of federalizing things, but in this instance, we have a Federal program, which is called Social Security, and I think it needs to be administered in a uniform way.

In times past, members have expressed interest in streamlining the appeals process. Eliminating the reconsideration stage has been discussed. However, the reconsideration is both more timely and more likely to result in an allowance than the review performed by the Appeals Council.

Specifically, in the September 1993 quarter, reconsiderations averaged 53 days and appeals averaged 138 days. In fiscal 1992, the allowance rate was 17 percent at the reconsideration stage but 4 percent on appeal. One can understand why some advocacy groups have characterized the Appeals Council as the "Great Black Hole of SSA."

At this time, I believe relations between the States and SSA are satisfactory and I do not anticipate that HHS would Federalize any State agency, but I still believe that the ability to do so is a useful management tool that we should provide the agency before the need arises.

This year, my bill has two features that I hope you will consider. As you know, SSA is testing four styles of case management in eight cities. SSA will report on those demonstration projects to this committee. I would add to that report a requirement that SSA develop a legislative proposal to extend case management activities to up to one-third of all beneficiaries by December 31, 1997, and up to 50 percent of all beneficiaries by December 31, 1999.

You might say, why not do it on 100 percent? The answer to that is a practical one. SSA does not have the resources or the capability to do 100 percent, and to give them that workload would, I think, distort an orderly process that could be done very, very well on the phased-in basis that I mention.

Mr. Chairman and Mr. Bunning, I think we need to face the fact that we have lost control of the continuing disability review process. We need to return our attention to the front end of the claims process and help those who are able to return to work.

I would like to have gone further with case management, but candidly, I don't think that SSA is capable of undertaking it, as I mentioned earlier. My bill would give them 2 years to complete the current pilot projects and 4 years to offer such services. In the event anyone thinks that I am impatient, I would remind them that we gave SSA this demonstration project authority in 1980. There is some value to institutional memory in this body.

Finally, SSA has never projected any program costs for my bill but has estimated modest administrative costs. While well within the House *de minimis* standard, it would potentially raise a point of order in the Senate.

My bill contains a modest savings, which I offer to you, if it will help to advance a Social Security Court. The savings would result from the elimination of future survivor benefits based on currently insured status. The program is now fully mature and there is no continuing reason to pay years of benefits based only a year-and-a-half of work to workers who are over 30 years old.

In other words, the law continues to provide survivors' benefits to workers who are over 30 who have been in the program for only

a year-and-a-half, and I think that should be eliminated. The GAO has recommended the elimination, and SSA estimates savings of $20 million over 5 years and $64 million over 10 years, which is about the cost of my bill.

Let me close by encouraging you to go forward with a Social Security Court, whether you adopt my proposal or your proposal. It is urgently needed.

I thank you for your generosity in letting me appear a few minutes late and listening to my testimony.

Chairman JACOBS. Thank you, Mr. Archer.

Mr. Bunning.

Mr. BUNNING. I just want to thank you, Bill, for being here. When we consider what we have before us, we will consider these suggestions you have made. Thank you.

Chairman JACOBS. Mr. Jefferson.

Mr. JEFFERSON. No questions.

Chairman JACOBS. Mr. Houghton.

Mr. HOUGHTON. I have a question. I am not a lawyer, and I don't understand the proceedings as well as you do. I understand when you say that people should be judged by the same——

Chairman JACOBS. I always beware of people who say that.

Mr. HOUGHTON. Hold onto your brief. But people should be judged by the same standards. That is not true of the rest of the law, is it? I mean, there isn't one circuit, there are many circuits. Why is this different?

Mr. ARCHER. It is true that it is a problem with the rest of the law in many instances. It is a problem with the determination of IRS decisions in many instances. This subcommittee only has jurisdiction over Social Security. I have the same concern in other aspects of the law. The gentleman is absolutely right. When we have diverse applications of the Tax Code, that is inequitable and something that we should be trying to correct.

Mr. HOUGHTON. I have just one other question, if I could ask it, Mr. Chairman.

So you think that your proposal of eliminating Appeals Council review plus this bill should go hand in hand?

Mr. ARCHER. I do. Yes. I do because I think we do need to streamline it to some degree, and that would have a streamlining effect.

Mr. HOUGHTON. Thank you.

Chairman JACOBS. Mr. Jefferson.

Mr. JEFFERSON. Let me ask a question. I haven't heard a lot of ordinary people complaining about the nonuniformity of decisions or the potential for nonuniformity of decisions from geographical area to geographical area. What I hear people complain about almost all the time is how long it takes to get a result.

If we do all of this, how do we affect that issue, so that people feel in their pockets and their homes and that is a real-felt need?

Mr. ARCHER. The gentleman, I think, was probably not here during the first part of my testimony, where I commented that I think we should accentuate the reconsideration part of the process, which takes an average of 53 days. When you go to the Appeals Council, it takes 138 days, and my recommendation is to eliminate the Ap-

peals Council, which I think would promote precisely what the gentleman is suggesting.

It is a concern. It is a very, very important concern to try to shorten this entire process.

Mr. JEFFERSON. Thank you.

Chairman JACOBS. Thank you very much. We appreciate it, Bill.

Now we will go to Mr. Arner.

STATEMENT OF FREDERICK B. ARNER, KENSINGTON, MD., AUTHOR OF MONOGRAPH, "A MODEL STRUCTURE FOR THE SOCIAL SECURITY ADMINISTRATION"

Mr. ARNER. Mr. Chairman, I am delighted to be here to support your bill and Mr. Bunning's bill. Its passage would be a significant first step in bringing increased rationality to the Social Security disability programs under titles II and XVI, which are out of control from a policy and fiscal standpoint. To me, it is axiomatic that, to the greatest degree possible, claimants be treated the same throughout the country, as is writ over those columns of that marble building up the street, "Equal Justice Under Law."

As you know, many persons have supported a Social Security Court bill over the last, I guess it is almost 17 years now. Mr. Archer is the last in that group. All of these proposals have been opposed by the advocate community, who have argued that a generalist district court is a better protector of claimants' rights than a specialized court judge, who, in their view, would be dominated by the administering agency.

Although I believe this is a bogus argument, it apparently has been an effective one in preventing remedial action, and lack of uniformity of treatment of claimants, because of judicial intervention, has continued unabated.

The beauty of your proposal, Mr. Chairman, is that it bypasses this generalist-specialist dispute. It keeps the generalist district court judges but requires that their decisions be reviewed by one circuit court, which will gradually establish a coherent and relatively uniform body of case law.

What we have today verges on judicial chaos. We have 12 circuits handing down different decisions, and although in theory they are subject to review by the Supreme Court, in reality, this does not happen.

The courts have had a dramatic effect on the Social Security disability program. Social Security litigation problems are primarily in the disability area inasmuch as only 1.5 percent of court cases involve retirement and survivors insurance. Moreover, although less than 1 percent of claimants take their individual cases to court, to the extent that one of those cases necessitates an acquiescence ruling, thousands more are potentially impacted.

In my 1989 report on the disability program for the Alfred P. Sloan Foundation, I wrote:

> In a sense, the problem of nonacquiescence is a "what comes first, the chicken or the egg?" proposition. If the government appealed adverse cases on policy issues or had a program of prompt relitigation of the holdings of cases not suitable for appeal, you would not have the controversy you have today. Those who supported the 1984 House provision which required acquiescence in Circuit case law argued that such a statutory stipulation would make the government appeal cases. There is possible validity in this belief, but the failure to appeal cases aspect of nonacquiescence also

is a bureaucratic and structural problem. Thus, if the "no appeals" policy continued under strict "acquiescence" policy, 5,000 adjudicators in 54 State agencies and 700 ALJs would have the task of applying 12 different interpretations of law and procedures.

Unfortunately, my gloomy scenario is well on its way to fulfillment. According to the settlement in the Second Circuit *Stieberger* case, the New York State agency, the ALJs, and the Appeals Council must follow Second Circuit case law as spelled out in a manual prepared by the government with the active participation of the court and the plaintiff's attorney. What circuit will be next with this foolishness?

Mr. Chairman, your bill, over time, would ensure a uniformity of judicial interpretation throughout the nation. It would also enhance judicial respect for the substantial evidence rule in the Social Security Act, blatantly disregarded by many courts, and would also go a long way in controlling district court abuse of remand authority. Other varying court practices of different circuits would also be eliminated.

Mr. Chairman, your bill would also be particularly effective in dealing with the multitude of class action suits which have driven or affected nearly every significant disability change in the last decade. There are about 100 class actions pending. Like volcanoes, some are dormant but can erupt with great impact. A 1992 estimate was that there could be a potential of 15 million people involved in pending litigation.

The subject matter of the class actions is broad, as I have enumerated in my testimony, and Mr. Archer has referred to some of it, too.

Whoops, I got it. To just finish, I have to recommendations, one that class action——

Chairman JACOBS. I am afraid it is more than a whoops; your time is up.

Mr. ARNER. It is absolute?

Chairman JACOBS. Yes.

Mr. ARNER. OK.

[The prepared statement follows:]

Testimony before Social Security Subcommittee on H.R. 3265,October 21,1993, Frederick B. Arner,

Mr. Chairman, I am here to support the bill you and Mr. Bunning have introduced, H.R. 3265, the Social Security Court of Appeals Act. Its passage would be a significant first step in bringing increased rationality to the social security disability programs under titles II and XVI, which are out of control from both a policy and fiscal standpoint. To me it is axiomatic that to the greatest degree possible claimants be treated the same thoughout the country. As it is writ over those columns of that marble building up the street--Equal Justice Under Law.

As you know, many persons over the last fifteen years have supported the establishment of a Social Security Court, including the former chairman of this Subcommittee, James Burke and J.J. Pickle, and your colleague Bill Archer who testified here today. Such a court has been also been recommended by a number of blue ribbon commissions, the latest of which is the Federal Courts Study Committee which had been established by Congress and reported back to you in 1990. All these proposals have been opposed by the advocate community who have argued that a "generalist" District Court judge is a better protector of claimant's right than a "specialized" court judge who, in their view, would be "dominated" by the administering agency. Although I believe this is a bogus argument, it apparently has been an effective one in preventing remedial action and the lack of uniformity of treatment of claimants because of judicial intervention has continued unabated.

The beauty of your proposal Mr. Chairman is that it by-passes this "generalist--specialist" dispute. It keeps the "generalist" District Court judges but requires that their decisions will be reviewed by one Circuit Court which will gradually establish a coherent and relatively uniform body of case law. What we have today verges on judicial choas. We have twelve circuits handing down different decisions and although in theory they are subject to review by the Supreme Court, in reality, this does not happen.

The courts have had a dramatic effect on the social security disability programs. Social security litigation problems are primarily in the disability area inasmuch as only 1.5% of the court cases involve retirement and survivors insurance cases. Moreover, although less than one percent of claimants take their indiviual cases to court, to the extent that one of those cases necessitates a Acquiescence Ruling, thousands more cases are potentially impacted.(In 1992 there were 44 Rulings in effect and another 8 in progress.) These Rulings are often circuit-wide exceptions to standards and procedures otherwise carried out in the rest of the nation.In 1989 in my report on the disability program for the Alfred P. Sloan Foundation, I wrote:

> In a sense the problem of nonacquiescence is a "what comes first, the chicken or the egg?" proposition. If the Government appealed adverse cases on policy issues or had a program of prompt relitigation of the holdings of cases not suitable for appeal, you would not have the controversy you have today. Those who supported the 1984 House provision which required acquiescence in Circuit case law argued that such a statutory stipulation would make the government appeal cases. There is possible validity in this belief but the failure to appeal cases aspect of nonacquiescence also is a bureaucratic and structural problem. Thus, if the "no appeals" policy continued under a strict "acquiescence" policy, 5000 adjudicators in 54 State agencies and 700 ALJS would have the task of applying 12 different interpretations of law and procudures. Unfortunately, my gloomy scenario is well on its way

to fullfillment. According to the settlement in the 2nd Circuit "Stieberger" case the N.Y State agency, the ALJs,and the Appeals Council must follow 2nd Circuit case law as spelled in a "manual" prepared by the Government with the active participation of the Court and the plaintiff's attorney. What Circuit will be next with this foolishness?.

Mr. Chairman, your bill, over time, would ensure a uniformity of judicial interpretation throughout the nation. It would also enhance judicial respect for the substantial evidence rule in the Social Security Act, blatantly disregarded by many courts, and could also go a long way in controling District court abuse of remand authority. Other varying court practices of the different circuit would be eliminated

Mr. Chairman, your bill would also be particularly effective in dealing with the multitude of class action suits which have driven or affected nearly every significant disability change in the last decade.(There are about 100 class actions pending. Like volcanoes, some are dormant but can erupt with great impact. A 1992 estimate was that that there could be a potential of 15 million members involved as a result of pending litigation.) The subject matter of class actions is broad-- the definition of pain and what is a "not severe" disability, the scope and definition of alcoholism and drug addiction as a compensable impairment, the evaluation of disability in children, the weight to be given treating physician opinion, and a growing number of cases challenging State agency procedures. Most of these actions have adversely affected the administration of a uniform national disability program.

After a period of years in which the Social Security Administration fought with some vigor in the courts for a uniform national program, the government, beaten down in past struggles, is relatively passive today. Settlement is the watchword, and what is often the result is the reworking(often more than once) of hundreds of thousands of cases which further disrupts and makes less uniform a greatly over-burdened system. Your one Appeals Court approach could see to it that the policy interpretation which results from a class action would be applicable on a national basis. If the class action was based on the failure of a State agency to follow the law, regulations, or the POMs, the Circuit Court could make sure that all State agencies would be similarly bound.

I would suggest an amendment of the bill so that class actions would have to be filed with the proposed single Circuit Court which would assign it to an appropriate District Court. This would avoid forum shopping by interest groups and would allow instantaneous joining of suits on the same subject matter under one District judge, a much more efficient and rational process.

Another commendable aspect of your legislation is that it could be implemented slowly and smoothly -- circuit by circuit-- without any great disruption of the on-going judicial process. However, since a national circuit law would have to be developed from scratch, the executive branch would have to follow a more aggressive review and appeal process than is currently in place. Today there are some institutional and legal impediments. The law requires an appeal by the Government within 60 days of the District Court decision and the Justice Department requires that Social Security and HHS make their appeals recommendation within 30 days. The numbers and layers of lawyers, technicians, and bureaucrats who must input into the appeals process in the 30 day period is mind-boggling, and an effective review from both a policy and legal standpoint within this time period is very difficult if not impossible. I suggest a lengthening of the appeal time frame to at least 90 days. In the alternative, if Congress

would pass the Social Security independent agency bill with it clearly understood that Social Security would have its own attorneys with authority to appeal cases to the Circuit Court level without Justice Department participation, no lengthening of the time frame would be required. Ofcourse, appeals from the Appeals Court to the Supreme Court would still go through the Solicitor General.

I thank the Subcommittee for the opportunity to present my views.

Chairman JACOBS. We will get more when we get into the questioning.

Mr. Edles.

Mr. ARNER. It is a rough committee.

STATEMENT OF GARY J. EDLES, GENERAL COUNSEL, ADMINISTRATIVE CONFERENCE OF THE UNITED STATES

Mr. EDLES. Mr. Chairman and members of the committee, my name is Gary Edles and I am the general counsel of the Administrative Conference of the United States. On my right this morning is Candace Fowler, who is a staff attorney with the Conference. We sincerely appreciate your invitation to testify here this morning.

As the committee is aware, the Administrative Conference is the executive branch agency that advises the government on procedure and process issues. Our principal mission is to study aspects of the administrative process, including judicial review of agency decisions, and make recommendations to Congress, to the President, to agencies, and the courts on how that process can be improved.

The Conference has not studied or made recommendations about the precise concept of a specialized court of appeals to review district court decisions in Social Security cases, so we don't have a formal position on H.R. 3265. But in 1991, the Conference did evaluate the role of specialized courts in general in reviewing agency decisions, and a copy of our 1991 recommendation is attached to our prepared statement and will be included in the record.

This morning, I would just briefly highlight the Conference's conclusions and offer my views on how the Conference's recommendations relate to the structure of court review as proposed in H.R. 3265.

For nearly 50 years, since passage of the Administrative Procedure Act, the government has operated under a regime of administrative adjudication by specialist agencies, coupled with review of agency action in the generalist courts. The court's role is not to second guess the agencies, but rather to ensure that agencies have complied with their statutory directives, that they have acted in a reasonable fashion, and that they have made decisions based on a public record after full participation by affected parties. I think it is fair to say that such a system has, by and large, operated quite well.

Nevertheless, there has been some sentiment in recent years for assigning jurisdiction for review of agency decisions to a specialized court in the hope that it would provide more efficient or effective review for some types of administrative cases.

With this in mind, the Conference analyzed those situations in which some form of specialized judicial review might be desirable or indeed even preferable. In its 1991 study and recommendations, the Conference identified three factors that it believes should be present before Congress creates a specialized court for a particular body of cases.

First, review by a specialized tribunal can be useful if there is a particular need for uniformity in agency administration of programs.

Second, specialized courts can be useful in program areas in which one might reasonably expect a large volume of cases, the di-

version of which might significantly alleviate the burdens on the generalist Federal courts.

Third, specialization can be useful where there is a predominance of scientific or other technical issues requiring special expertise or a predominance of factual issues specific to particular cases whose resolution may not be best suited to the time of Article III judges.

Uniformity in decisionmaking is obviously an important factor in the context of administrative action under national programs like the one administered by the Social Security Administration, where the agency itself hopes to apply a single body of law and policy nationwide. I think fairness dictates, as has been mentioned, that similarly situated citizens be treated similarly around the country.

A single court of appeals for Social Security cases, as proposed in H.R. 3265, would certainly alleviate some of the problems created by the interaction of a centralized agency program with a regional Federal court system. Appeal of all cases to a single circuit court would result in early development of a consistent body of law in Social Security cases and greater uniformity of Social Security Administration policy across the nation.

But the creation of a Social Security Court of Appeals would not appear very likely to affect any significant workload reduction for the generalist courts. Under H.R. 3265, the district courts would still be the point of entry for more than 10,000 cases into the judicial review process. While the regional courts of appeals would be relieved of the responsibility for reviewing district court decisions, we are not aware that the case load of Social Security in those courts, namely 600 or 700 cases a year spread across all of the circuits, is now creating a particular burden on those courts.

Nor would it appear that any special expertise or technical proficiency is needed to handle the issues likely to be raised before the newly established court of appeals. Presumably, district judges will remain the principal reviewer of SSA factual determinations in specific cases and the newly created court would focus primarily on the range of statutory construction questions or perhaps even constitutional questions that are typically and quite capably handled by the generalist courts.

But perhaps most important, H.R. 3265 would create a Federal circuit court with a docket of cases that present a relatively narrow and repetitive subject matter jurisdiction. In the Conference's view, the use of that type of special court presents several drawbacks, which I will undoubtedly turn to in the question and answer period.

[The prepared statement and attachment follow:]

TESTIMONY OF GARY J. EDLES
ADMINISTRATIVE CONFERENCE OF THE UNITED STATES

Mr. Chairman and members of the Subcommittee, thank you for the opportunity to testify today on H.R. 3265, legislation that would create a new United States court of appeals to hear appeals from district court decisions in social security and supplemental security income cases.

As you know, the Administrative Conference was created by Congress in 1964 as a permanent, independent federal agency whose statutory mission is to advise the President, the Congress, and federal agencies on ways to improve the fairness and efficiency of federal agencies' administrative procedures. In addition, the Conference advises the Judicial Conference of the United States on matters of administrative law relating to judicial review of agency decisions.

The Conference is a unique organization. Its 101 members include representatives of all the major government departments and agencies with regulatory or policymaking responsibilities as well as members of the public, who are generally practicing lawyers, legal scholars, and others who are expert in the workings of government.

At the heart of the Conference's work are its recommendations, based on studies of specific aspects of administrative law and process. Research for these recommendations is generally conducted for the Conference by expert academic consultants, who submit reports to Conference committees for review. The committee process is an active one and frequently involves participation by non-Conference members who may be affected by Conference proposals. The give and take among Conference members, consultants, and interested parties results in a thorough consideration of all important issues. In due course, the committee prepares a set of recommendations and submits them to the Conference membership for consideration at one of our semi-annual meetings. Our 101 members then debate the recommendations, modify or amend them, until a final recommendation emerges.

The Conference looked generally at the question of specialized review of administrative action in a 1991 study and recommendation. (A copy of Administrative Conference Recommendation 91-9, *Specialized Review of Administrative Action*, is attached.) The study, prepared for the Conference by Professor Harold Bruff of the University of Texas School of Law, took a broad approach to the issue, reviewing the history of various specialized courts and identifying factors that should be considered in determining whether and when a specialized court would be effective. Neither the study nor the recommendation looked specifically at the advisability of a Social Security Court of Appeals like the one proposed in H.R. 3265. For that reason, the Conference has no formal position with respect to H.R. 3265. However, the general principles stated in the recommendation can usefully be applied to evaluate the proposal. I am happy to offer my views in that connection.

Finding the optimal structure for review of administrative cases involves a rather unscientific balancing of various factors: the need for uniform law versus the benefits of "percolation" of legal issues in the decentralized federal circuits; the value of expert decisionmakers versus the broader perspective of generalist judges; the efficiency of specialization against the potential that the judiciary will supplant the political branches of government in establishing national policy.

Uniformity in decisionmaking is obviously important in the context of administrative action under national programs like those administered by the Social Security Administration, where an agency hopes to apply a single body of law and policy nationwide. Because the federal court system that reviews these agency programs is decentralized, different circuits often reach different outcomes on the same issue. As a result, an agency is faced with the choice of refusing to acquiesce in decisions below the Supreme Court level, abandoning policy positions it believes to be correct, or implementing its program differently in different parts of the country.

Specialized review can significantly alleviate these problems. But it is not without its drawbacks. Our administrative law system places basic decisional responsibility for fact finding and policy development with the executive branch, which is responsible for implementing the statutes passed by Congress. Agency programs and conduct are subject to periodic Congressional oversight and ultimate review by the voters every four years. Decisions in individual cases are subject to judicial review by courts of general jurisdiction that examine those decisions impartially, in light of experience gained in considering a wider range of problems and issues.

The use of specialized courts may subtly transfer decisional responsibility away from politically accountable officials if the expert judges tend to substitute their judgment for that of the agency. Because of the preeminent position occupied by the members of the court when a single tribunal oversees a particular agency program, interest groups will be tempted to ensure that judges favorable to their perspectives are appointed to the court. In a worst case scenario, public perception that a court is biased can reduce its effectiveness even if actual bias is not present. Even in the best of circumstances, limiting a court's jurisdiction to a single type of case compromises the broader perspective that we have come to believe is a benefit of our generalist courts.

Recognizing that the balance among considerations may vary in the context of different administrative programs, the Conference in Recommendation 91-9 identified three criteria that should be present before Congress determines to create a specialized court for a particular body of cases.

The first factor is workload. Specialized courts can be useful in program areas in which one might reasonably expect a consistently large volume of cases, diversion of which might significantly alleviate burdens on the generalist federal courts.

Second, specialization can be useful where there is a predominance of factual issues specific to particular cases, or a predominance of scientific or other technical issues requiring special expertise of decisionmakers.

Third, specialization is useful if there is a particular need for uniformity in agency administration of a program.

How do these criteria apply to the structure proposed in H.R. 3265? Certainly, uniformity in the administration of the large SSA disability program would be valuable. Fairness dictates that similarly situated individuals be treated similarly. In addition, the agency can administer its program more efficiently and effectively if it is able to apply the same rules and standards nationwide. Indeed, the Social Security Administration, facing the dilemma that its centralized, nationwide agency program was reviewed by a decentralized court system, has found itself embroiled in controversy in the past, as the agency's policy of nonacquiescence in certain federal court decisions engendered strong opposition from some quarters.

The Court of Appeals for the Social Security Circuit proposed in H.R. 3265 would certainly alleviate the problems created by the interaction of a centralized agency program with the regional federal court system. Appeal of all cases to a single circuit court would result in earlier development of a consistent body of law in social security cases and greater uniformity of Social Security Administration policy across the nation.

However, the creation of a Social Security Court of Appeals would not likely effect any significant reduction in the workload of the generalist courts. Under H.R. 3265, the federal district courts, which are currently inundated with criminal cases, would still be the point of entry for cases into the judicial review process. SSA cases currently number about 11,000 a year. While the regional courts of appeals would be relieved of the responsibility for reviewing district court decisions, we are not aware that the caseload of social security cases in the regional courts of appeals -- currently between 600 and 700 cases a year -- is creating a significant burden.

Perhaps more important, H.R. 3265 would create a federal circuit court with a relatively narrow and repetitive body of subject matter jurisdiction. Such a court can run the risk of "capture," through the appointments process, either by the agency or by those who routinely oppose it. Even if the court were to avoid this pitfall, it might be perceived as "captured," thus lowering public confidence in its decisions.

As the Conference recognized, judges with specialized expertise might be useful where factual or technical issues, as opposed to legal issues, predominate. But that would not appear to be the case with the court of appeals proposed by H.R. 3265. Presumably, the district courts will remain the principal reviewer of SSA's factual determinations and the court of appeals would most likely focus primarily on a range of statutory construction questions or issues of agency discretion that are readily handled by generalist courts.

This is not to say, Mr. Chairman, that the benefits of a single court to review Social Security cases cannot be achieved in a fashion that would minimize the downsides. For example, the subcommittee might wish to consider giving exclusive jurisdiction over circuit-level social security appeals to one of the existing federal circuits. The United States Court of Appeals for the Federal Circuit, which already hears a range of administrative cases based on subject matter, and is thus an expert administrative tribunal with a diverse docket, is a likely candidate for such an approach. However, the addition of 600 or 700 SSA cases would constitute a significant addition to the Federal Circuit's current workload, which is approximately 1700 appeals annually. So it would probably be desirable to establish a regime of Federal Circuit review on an experimental basis. Such an approach would be consistent with the Conference's view that Congress, when it creates a specialized court, should provide for some form of periodic evaluation to determine whether specialized review is efficacious.

I appreciate the opportunity to appear before the subcommittee this morning and stand ready to answer any questions you may have.

ADMINISTRATIVE CONFERENCE OF THE UNITED STATES
2120 L STREET, N.W., SUITE 500
WASHINGTON, D.C. 20037
(202) 254-7020

1 CFR §305.91-9

OFFICE OF
THE CHAIRMAN

Recommendation 91-9

Specialized Review of Administrative Action

December 13, 1991

In recent years, there has been much talk of a crisis in the federal courts. In response, Congress empaneled the Federal Courts Study Committee, charging it with responsibility to examine the problems facing the courts and to develop a long-range plan for addressing them. The Committee issued its report in April 1990, touching on many different aspects of the problem, among them those related to judicial review of administrative action.

The Federal Courts Study Committee specifically rejected a proposal to divert all administrative appeals to a specialized court within the Article III judiciary. The Committee recognized that administrative review cases do not form a major percentage of the caseload of the federal courts of appeals. Yet assigning jurisdiction to a specialized court may provide more efficient or effective review for some types of administrative cases. It, therefore, proposed diversion of some cases now in the Article III courts to other adjudicatory bodies; in particular, the Committee recommended creation of an Article I court to review Social Security disability claims and perhaps, eventually, other administrative benefit claims.

Finding the optimal structure for review of administrative cases involves a complex balancing of various factors: the need for uniform law versus the benefits of "percolation" in the decentralized circuits; the value of expert decisionmakers versus the broader perspective of generalists; the efficiency of specialization versus the risk of bias that specialization entails. And the calculation can vary in the context of different administrative programs, which differ in the volume, complexity, and level of technical content of the caseloads they generate. For these reasons, the Conference, like the Federal Courts Study Committee, opposes allocating review of all administrative cases to a single specialized court, whether inside or outside the Article III system.

Should Congress consider the creation of specialized courts for review of particular administrative programs, this recommendation sets forth criteria for Congress to take into account in determining when to create specialized courts and how to structure them to enhance their effectiveness. Certain characteristics held in common by many federal regulatory and benefit programs raise particular problems within the existing system of judicial review. Uniformity in decisionmaking can be especially important in the context of administrative action under national programs. The agencies themselves are structured hierarchically, so as to speak with a single voice in applying law and policy to individual circumstances. But the federal court system that reviews these agency programs is decentralized, and different circuits often reach different outcomes on the same issue. The Supreme Court's capacity to resolve these conflicts is severely limited by the modest number of administrative law cases it considers each year. As a result, agencies often face the choice of refusing to acquiesce in decisions below the Supreme Court level, abandoning policy positions they believe to be correct, or implementing programs differently in different regions (and, consequently, treating similarly situated individuals or entities differently and encouraging forum shopping).

Another special aspect shared by some federal regulatory programs is that they involve complex technical or scientific issues, which may present great challenges to reviewing courts without special expertise in the relevant areas. Cases on review of agency rulemaking and ratemaking actions, in particular, frequently involve lengthy administrative records filled with conflicting material on technical issues of fact and policy; the judges must devote extra time to poring over these records and to producing the longer opinions these cases often engender.

Other federal programs (such as individual benefit programs) produce masses of litigation involving primarily questions of specific fact. Resolution of these issues may be an inefficient allocation of the time of the federal courts.

While review by specialized courts may offer a solution for these problems, specialization brings dangers as well. One premise of the national system of courts of general jurisdiction is that sound decisionmaking results from exposure to a wide range of problems and issues; adjudicative bodies with limited subject matter jurisdiction may lack this generalist perspective. Specialization can also produce bias problems of two kinds: the appointments process may be distorted as interest group pressures lead to the selection and confirmation of nominees for their views on specific issues; in addition, the standard of review may be distorted, either because expertise leads the court to substitute its judgment

for that of the agency or because familiarity with a particular agency leads the court to accept the agency's positions too readily. Public perception that a court is biased can reduce its effectiveness even when actual bias is not present. Finally, a specialized court may suffer reduced prestige if its repetitive subject matter attracts lower caliber judges.

The recommendations that follow offer guidance to Congress on the considerations it should take into account when it deliberates about whether to assign responsibility for review to a specialized court; they should be read as a whole. Thus, for example, the criteria in recommendation 2 may suggest assignment of Social Security disability cases to a specialized court; if Congress considers such an approach, however, it should take into account recommendations 3(B) and 3(C), favoring a balanced docket and a jurisdictional mix. These recommendations are intended to complement Conference Recommendation 75-3, "The Choice of Forum for Judicial Review of Administrative Action," 1 CFR §305.75-3 (1990), which the Conference continues to believe should form the foundation for decisionmaking about the appropriate forum for judicial review of administrative action within the Article III courts.

RECOMMENDATION

1. When considering proposals for the creation of a specialized court or courts to review administrative action, Congress should take into account that federal agency programs vary greatly in the volume, complexity, and level of technical content of the caseloads they generate, and, thus, any solutions adopted should be designed to fit the specific administrative programs to which they will apply. For these reasons, among others, the Conference opposes the creation or designation of a single specialized court, either within the Article III judiciary or under Article I, to handle review of all administrative cases.

2. Congress should recognize that it is appropriate to create specialized courts for particular administrative programs only if such programs are characterized by the following:

A. a program area in which one might reasonably expect a consistently large volume of cases, diversion of which might significantly alleviate burdens on the generalist federal courts;

B. the predominance of factual issues specific to particular cases, or the predominance of scientific or other technical issues requiring special expertise of decisionmakers; and

C. the particular importance of uniformity in agency administration of a program.

3. If Congress creates specialized courts to review particular administrative programs, it should, to the extent possible, structure the courts as follows:

A. To minimize jurisdictional uncertainty, the subject matter before the courts should be segregable from other claims.

B. To ensure that the courts maintain a balanced perspective on the issues before them, the courts' dockets should be designed to expose judges to all sides of pertinent controversies and to the broadest possible scope of related issues within a field of law.

C. To encourage generalist judicial appointments, to minimize distortion of the standard of review resulting from loss of the generalist perspective, and to avoid the fact or appearance of capture by special interests, the courts' subject matter jurisdiction should be diverse.

If the court provides the final stage of judicial review before Supreme Court review, satisfaction of criterion C is essential.

4. If Congress creates specialized courts to review particular administrative programs, it should provide for periodic evaluation of those courts to determine whether there is a continuing need for specialized review.

5. In any legislation providing for specialized review of particular administrative programs, Congress should assign to each court or reviewing body the type of functions it is best suited to perform and should minimize duplication of review functions. In particular, any such legislation should:

A. Avoid *de novo* review of factual issues already subject to formal adjudication at the agency.

B. Make the decisions of specialized courts final on review of questions of fact specific to the case (including the sufficiency of the evidence in that case by whatever standard it is reviewed).

C. When review has been assigned to an Article I specialized court, provide a subsequent layer of judicial review by an Article III court for questions of constitutional or statutory interpretation.

Chairman JACOBS. Thank you, Mr. Edles.

Mr. Bunning.

Mr. BUNNING. I would like to ask Mr. Arner, would you support eliminating the review by the Appeals Council, as advocated by Mr. Archer in his bill?

Mr. ARNER. That is one that has been kicked around quite a lot. My reservation about it is the same reservation I have about monitoring the administrative agency. I don't think the State agency operation is being sufficiently monitored, very poorly monitored. I am afraid the ALJs are not being sufficiently monitored and subject to review.

So to the extent that the ALJs would go completely unreviewed, I have some reservations about it. That would be my position.

Mr. BUNNING. All right. Can you clarify your statement that up to 15 million could be involved in class action suits, about 5 million disabled are receiving Social Security, another 4.5 million receive SSI. There is some overlap, of course. Where is the basis for the 15 million?

Mr. ARNER. I think that estimates came from some administration source, but these class action suits are so broad based—I am moving my hands, Mr. Pickle, as you remember—are so broad based, they deal with such subjects as pain. If you change the evaluation of pain, you are going to be dealing with a tremendous number of claimants and other of these suits deal with such broad subject matters.

So these class action suits, these acquiescence decisions can affect a great number of individuals. That 15 million is just probably a guess, a broad estimate.

Mr. BUNNING. Thank you.

Chairman JACOBS. Mr. Jefferson.

Mr. JEFFERSON. No questions.

Chairman JACOBS. Mr. Houghton.

Mr. HOUGHTON. I hear the reasoning behind creating a single court, but let me ask you a money question. As I understand it, the disability trust fund is actually running out of money. Is that one of the prime drivers of this concept of a single court?

Mr. ARNER. It is one of the factors that you have to take into consideration. It has a rather major impact, I could argue, on the fiscal condition of both the OASDI program and the SSI program. Yes, the *Zebley* case is a good example of what has happened in the SSI area and that has crept over, along with some other cases, into the Social Security. The fact that you have had these court cases gradually changes even the adjudicative climate out there, you have a very difficult situation. Cost estimates have gone bananas in the DI area.

Mr. HOUGHTON. Let me just flip this a minute. If you didn't have the problem with the disability trust fund, would there be such a pressure to change the system?

Mr. ARNER. No. Well, I think for Congress to control it, Congress has great difficulty in approaching the problem right now because of all the circuit court variation. With one circuit court, if they could see the problem, you would get one decision in an area and then the Congress could address it, even before it went to the Supreme Court. Now you just have a number at variance.

Chairman JACOBS. Mr. Edles, did you want to comment?

Mr. EDLES. I don't have any view on the fund itself, no.

Chairman JACOBS. Mr. Pickle, this is a witness, Citizen Arner. You may have had some appointments with him, they tell me, in the past. Is that true?

Mr. PICKLE. Unfortunately, that is true.

[Laughter.]

Mr. PICKLE. Mr. Chairman, I regret I couldn't be here at the opening of the session because I was due on the floor of the House when the visiting Reverend Chris Holmes of Maryland gave the opening prayer, and I had appointed Chris Holmes as a page in 1974. He was a tall, skinny fellow, Jim. He was on the page basketball team, and in 1 game he made over 54 points. I observed that if it hadn't been for the calling of the Almighty, he might have been known as the Michael Jordan of the 1970s.

But I was on the floor of the House. I wanted to be here to hear what our colleague, Mr. Archer, had said, because I had joined him a few years back in exploring the possibility of a Social Security appeals court.

I particularly want to pay my respects to Fred Arner. Fred said that he was still gesturing with his hands, and 10 or 12 years ago, when we were in the midst of offering a reform version of the Social Security program and the disability program, Mr. Arner was gesturing with his arms and his hands and legs and his lips, too, because he is a pretty good performer. He is one of the most experienced men in the Social Security field of anybody in this Capitol or this Nation. I am personally proud to have him here.

Mr. Arner, I will read your testimony, and I understand that Mr. Jacobs and Mr. Bunning have a little different approach than what Mr. Archer originally had, but I like the general concept and I will be happy to be working with you and you, Mr. Chairman.

Thank you very much.

Chairman JACOBS. Thank you, Mr. Pickle.

Mr. Arner, the disparity of rules in the various circuits, I think, is a problem that most people would recognize, but another allied question comes to my mind. One of the witnesses, perhaps you or Bill, said something about a disparity of awards as well in determination of what constitutes permanent total disability.

The idea is that the Federal Government in one respect recognizes the various economies within our own country, that is, the variations and costs of living, that $100 will buy more in St. Petersburg than it will in New York City. What thought have you given to that in terms of adequate compensation, the number of beans that go on the table of the earner? Do you have anything to say about that?

Mr. ARNER. We do have this problem in setting the level of substantial gainful activity, the statutory amount that determines ability to work.

Chairman JACOBS. It is the same thing.

Mr. ARNER. Right, and the amounts that have been set have been pretty arbitrary. The administration put it at $300, and then 10 years later they changed it to $500.

One of the things that I think we had in one of our bills, I think one of Mr. Pickle's bills, was a provision on substantial gainful ac-

tivity, that would relate it to the cost of living or the wages, probably to the wage level, and it would go up automatically. That makes a little more sense——

Chairman JACOBS. That would still be universal in terms of the country.

Mr. ARNER. Yes, how you would go to something like they tried to do in Federal pay, where they are going to pay more to people in certain areas, would be difficult, but it is reflected in the average monthly wages which determines benefit amount.

Chairman JACOBS. Blue collar prevailing wages and all. It is kind of a bear when you think about it. I mean, it sounds like a drum of snakes to get into, particularly when people are mobile and you have had a determination in St. Petersburg and for some reason or another you move to New York and your check follows you and it is inadequate there, where it was adequate before.

I can see that it would be a daunting task to address the matter. Yet, it is also a daunting reality. It seems to me a very serious problem. We don't like disparity of treatment, and yet by operation of the cost of living you automatically get disparity of treatment through imposing one national level of compensation. It seems to me it is something that we ought to give a little bit of thought to, and the model, of course, again, would be the prevailing wage under the blue collar worker situation.

We thank the panel very much for its contribution to the record, and we will go on to the next panel.

We have the National Senior Citizens Law Center, Ethel Zelenske; the Association of Administrative Law Judges, Inc., Francis O'Byrne, president; and the National Association of Disability Examiners, Robert Burgess, president, accompanied by Carroll Moore, legislative director. Thank you all for helping us.

STATEMENT OF ETHEL ZELENSKE, STAFF ATTORNEY, NATIONAL SENIOR CITIZENS LAW CENTER

Ms. ZELENSKE. Thank you for inviting me to testify this morning. Over the last 14 years, I have represented hundreds and maybe thousands, it seems, of Social Security and SSI claimants at all levels of the administrative process, in Federal district court and before the Fourth Circuit Court of Appeals.

Based on my experience and in my opinion, I don't think that a Social Security Court of Appeals is the most efficient, effective, or fair way to achieve national uniformity or to benefit a system which desperately needs repair.

The courts have played a vital role in protecting claimants' rights. They have stepped in to provide guidance and standards where SSA has failed to articulate clear policies. The system has benefitted from these so-called conflicts or differences between the circuit courts. Our Federal court system provides for resolution of these conflicts by the Supreme Court. A single Social Security Court of Appeals would eliminate this statutory provision for review by the Supreme Court, since there would no longer be a conflict among the circuits.

As other witnesses have testified, the percolation of ideas among the circuit courts have allowed for a more thorough consideration

of issues. Ultimately, this helps to determine which direction Federal law should take.

As a result, rather than creating regional differences, I feel that the decisions by the circuit courts of appeal have actually contributed to establish national standards. There are several notable examples of this.

In 1984, Congress passed amendments to the Social Security Act relying on numerous circuit court decisions involving the issue of the standard to use in terminating benefits to disability claimants and also the standards to use in determining disability based on mental impairments.

More recently, Social Security itself has relied on circuit court decisions in the important areas of the weight to accord medical and subjective evidence of disability. These are both areas where the courts have had to provide guidance because of a lack of articulated policies. While there were some variations among the circuits, the biggest split was between all of the circuits and SSA.

As a result, in 1991, Social Security promulgated very comprehensive and detailed regulations dealing both with medical evidence and the weight to accord medical evidence and with pain. By its own admission, when it published the final regulations, SSA stated that it did rely on circuit court precedent and stated that it was guided by principles upon which most of the courts agreed.

As I said earlier, the circuit courts have generally agreed with each other in important areas. The disparity that has existed is not one that has been caused by regional variations so much as by SSA's policy of nonacquiescence. The result of this has been that there are two sets of rules applied, one to those individuals with the fortitude and persistence to file an appeal in court and one for those who cannot.

I don't think that a single circuit court will eliminate this unfairness. You are still forcing claimants to file an appeal in order to obtain justice, and I feel that insuring that appropriate standards are applied earlier in the process is a better approach to eliminating this disparity.

There was some earlier discussion about the quality of decisions from district courts and circuit courts, given their generalist nature. In my experience, I don't think that the quality has been lessened. In fact, I think it has been heightened. The system has benefitted from cases being heard by regular Federal judges who hear a wide variety of cases from a diverse group of litigants. This provides a broad background against which they can judge the reasonableness of SSA's practices.

Given the nature and size of the proposed case load for the new court, there are questions about whether it will merely become another Appeals Council. Will it rubber stamp agency action? In the end, will it be as vigilant as the Federal courts have been in protecting claimants' rights?

I also wanted to make a comment about the travel problems and the limited access. Airplane travel isn't so easy if you don't have the money to get there. A lot of claimants, whether they are Title II claimants or SSI claimants, are indigent while they are waiting for their benefits. In addition, and I am speaking on behalf of Legal Services attorneys, the funds aren't there to provide for expensive

travel, and Legal Services attorneys represent a large number of claimants in courts of appeals.

Currently, it is usually a drive. I have driven to Richmond to Baltimore for cases. When Representative Jacobs spoke about driving from Indianapolis to Chicago, that is more typical.

Thank you.

[The prepared statement follows:]

NATIONAL SENIOR CITIZENS LAW CENTER
1815 H STREET, N.W., SUITE 700
WASHINGTON, D.C. 20006

TELEPHONE: (202) 887-5280 FACSIMILE (202) 785-6792

WASHINGTON, D C
BURTON D. FRETZ
EXECUTIVE DIRECTOR

**STATEMENT OF ETHEL ZELENSKE, STAFF ATTORNEY,
NATIONAL SENIOR CITIZENS LAW CENTER
BEFORE THE SUBCOMMITTEE ON SOCIAL SECURITY,
COMMITTEE ON WAYS AND MEANS
UNITED STATES HOUSE OF REPRESENTATIVES**

**HEARING ON H.R. 3265
TO CREATE A SOCIAL SECURITY COURT OF APPEALS**

OCTOBER 21, 1993

Thank you for inviting me to testify before the Subcommittee today.

The National Senior Citizens Law Center (NSCLC) provides national advocacy on behalf of poor persons with specific emphasis on representing the interest of the lowest income elderly people, particularly women and racial and ethnic minorities. NSCLC also provides support to legal services, pro bono, and seniors' advocates who represent elderly poor people. One of NSCLC's priority areas is increasing income security for low-income elderly persons.

The reasons given in the hearing notice for creating a Social Security Court of Appeals, i.e., to create a uniform body of case law and to guarantee that the claims of similarly situated claimants are treated without regional disparity, are good. However, for the reasons set forth below, creation of a Social Security Court of Appeals is not the most effective, efficient, or fair manner in which to accomplish these goals.

As recognized by the Subcommittee, intervention by the federal courts of appeals has played and continues to play a vital role in protecting the rights of claimants. The courts have halted illegal practices by SSA and have provided standards and guidance in instances in which the agency failed to articulate clear policies. This vital role has been enhanced by the process of "percolation," whereby all of the regional circuit courts address issues as they arise. Through this process, a body of law develops that leads to fuller consideration of issues than if only a single court passed on each issue.

Contrary to agency statements, this process of review by different circuit courts has not led to significant regional variation in rules. In general, the circuit courts have reached agreement on core issues concerning the programs administered by SSA. To the extent that variation has arisen, SSA has been able to restore national uniformity through the promulgation of uniform standards. These standards have been significantly improved by the fact that they have drawn on the collective wisdom of the courts of appeals.

Because circuit courts have generally agreed with each other, the principal unfairness has not been regional variation, but SSA's refusal to acquiesce in the rulings of the courts of appeals. This refusal has led to two sets of rules -- one set applicable to claims considered in court and another set applicable to claims decided at the administrative levels.

I. THE CIRCUIT COURTS HAVE CONTRIBUTED TO NATIONAL UNIFORMITY.

The most notable examples of how the dialogue between circuit courts has benefitted the system and led to national uniformity occurred in the mid-1980's. The issues before the courts were the termination of benefits to thousands of individuals whose conditions had not medically improved and SSA's standard of denying benefits to persons with mental impairments without performing an individualized assessment of disability.

The courts were highly critical of SSA's actions and, one after another, held that the agency's policies were unlawful and ordered relief for aggrieved individuals. Congress responded in both of these areas when it passed the Social Security Disability Benefits Reform Act of 1984,[1] relying on the similarities in the numerous court decisions to develop national standards through legislation.

SSA has also benefitted from guidance provided by the circuit courts in developing uniform standards. Because, in the past, SSA had failed to promulgate comprehensive rules for weighing medical and subjective evidence in disability claims, the courts stepped in to fill the void and have established an extensive collection of precedent in these areas. The "treating physician rule" exists in every circuit and provides fairly similar guidance: generally, the opinion of a treating physician is given more weight than that of a consulting or nonexamining physician. While variations exist from circuit to circuit, the biggest split was between the circuits and SSA.

Finally, in 1991, SSA moved to address this problem when it published final rules describing the weight to be given all medical evidence, including reports from treating physicians and consultative examinations.[2] The extensive circuit case law played an important role in development of the regulations. Even SSA stated that it had "been guided" by basic principles upon which the majority of circuit courts "generally agree."[3]

Later in 1991, SSA addressed another area of well-established circuit precedent, the evaluation of pain in disability claims.[4] Again, by SSA's own admission, these regulations draw from the body of case law in providing a detailed framework for evaluating subjective symptoms, including pain.[5]

Even if these regulations differ from circuit precedent, it is likely that their overall validity will be upheld. To date, only one court has squarely addressed this issue. In Schisler v. Sullivan, the Second Circuit, which has one of the most liberal

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[1] Pub. L. No. 98-460, §§ 2 and 5, 98 Stat. 1794 (1984).

[2] Standards for Consultative Examinations and Existing Medical Evidence, 56 Fed. Reg. 36932 (Aug. 1, 1991).

[3] These principles are: (1) "treating source evidence tends to have a special intrinsic value by virtue of the treating source's relationship with the claimant" and (2) "if the Secretary decides to reject such an opinion, he should provide the claimant with good reasons for doing so." 56 Fed. Reg. at 36934.

[4] 56 Fed. Reg. 57928 (Nov. 14, 1991).

[5] See, for example, 56 Fed. Reg. at 57932 ("We believe our policy, as expressed in these final rules, is consistent with circuit court rulings ....").

"treating physician rules," recently upheld the validity of the medical evidence regulations. While acknowledging that certain parts of the regulations diverged from Second Circuit precedents, the court held that because they are "reasonable" and not "arbitrary and capricious," they are valid and binding on the courts. Schisler v. Sullivan, __ F.2d __ , No. 92-6232 (2d Cir. Aug. 23, 1993).

Clearly, the twelve circuit courts have played an important role in determining the final direction of important national standards in the disability arena. This has allowed for a more thorough and thoughtful consideration of the issues than if a single court had passed on each. As a result, both Congress and SSA have been able to rely upon the extensive circuit precedent in these areas to produce a reasoned final product.

II. A SOCIAL SECURITY COURT OF APPEALS WILL NOT ELIMINATE THE DISPARITY BETWEEN THOSE CLAIMANTS WHO APPEAL AND THOSE WHO DO NOT.

The disparity created by different rules being applied to claimants is not caused by regional variations, but rather by SSA's failure to acquiesce in circuit court decisions. The result is that two sets of rules apply -- one for those who persist through the appeals process and one for those who do not. A single court of appeals will not eliminate this unfairness.

In 1984, the Committee on Ways and Means considered SSA's nonacquiescence policy and was highly critical about the consequence for claimants, namely, that distinctions exist between claimants who pursue their claims to the appeals court level and those who cannot:

> The committee can find no reason grounded in sensible public policy to force beneficiaries to sue in order to obtain what has been declared by the Federal court as justice in a particular area. **Such a policy creates a wholly undesirable distinction** between those beneficiaries with the resources and fortitude to pursue their claims, and those who accept the government's original denial in good faith or because they lack the means to appeal their case (emphasis added).[6]

At the time, the House passed legislation that SSA cease its policy of nonacquiescence. While this provision was dropped in the Conference agreement, the conferees explicitly stated that the agreement to drop the provision should not "be interpreted as approval of 'non-acquiescence' ...."[7] They offered two recommendations to achieve the congressional intent that the Secretary resolve policy conflicts promptly in order to achieve consistent uniform administration.[8] Creation of a Social Security Court of Appeals was not suggested as an appropriate solution.

A more appropriate remedy for the serious problems facing claimants today should focus on making changes where they are most needed -- at the beginning of the process. As recognized by Congress in 1984, forcing claimants to pursue an appeal in order to obtain justice does not achieve a goal of uniform standards

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[6] House Rep. No. 98-618 at 24-25, *reprinted in,* 1984 U.S.C.C.A.N. 3038, 3061-62.

[7] House Conf. Rep. No. 98-1039, p. 37, *reprinted in,* 1984 U.S.C.C.A.N. 3095.

[8] The options were (1) appeal to the Supreme Court or (2) seek a legislative remedy. *Id.*

applicable to all. Establishment of Social Security Court of Appeals will perpetuate this "wholly undesirable distinction" and will "serve[s] to cause gross disuniformity between those who can pursue their appeals and those who cannot."[9]

III. THE SYSTEM BENEFITS FROM THE REGULAR FEDERAL COURTS HEARING SOCIAL SECURITY CASES

As the Subcommittee has recognized, the federal courts have played a critical role in protecting the rights of claimants over the last decade. The system overall has been well-served from having cases heard by regular, and not specialized, federal judges who hear a wide variety of federal cases. By adjudicating cases involving private parties, corporations, and other government agencies, federal district and circuit courts have a broad background against which to measure the reasonableness of SSA's practices. In addition, questions of class action management and discovery are better handled by courts that are accustomed to these issues. These are not areas for which technical expertise is needed or is necessarily better. Also, the percentage of the federal court caseload consisting by Social Security appeals does not impose an unreasonable burden on the courts.[10]

One must seriously question whether a specialized court limited to hearing Social Security claims would be as capable as the federal courts in objectively judging SSA. For instance, will a Social Security Court of Appeals simply become another Appeals Council, given the limited number of judges proposed (5), their high caseloads, and the repetitiousness of issues? Will the court, as has been the case with the Appeals Council, become a "rubber-stamp" for agency action, jaded to individual facts or too accepting of questionable agency practices? It is important to remember that the Appeals Council failed to play a vigilant role when thousands of beneficiaries had their benefits terminated in the 1980's.

IV. A SPECIALIZED COURT WILL RELEGATE SOCIAL SECURITY CLAIMANTS TO SECOND-CLASS CITIZENSHIP IN THE FEDERAL SYSTEM.

While the stated reason for creating a Social Security Court of Appeals, i.e., to ensure that similarly situated claimants are treated uniformly, is commendable, the unintended result of the court may be to create a second-class court system for Social Security claimants.

Given the nature of the proposed caseload, the quality of applicants for judgeships may not be as high as we have come to expect for the federal court system. A lifetime appointment to decide large numbers of what could become paper appeals in a single area may not draw from the same pool of applicants as other circuit court vacancies.

In addition, a Social Security Court of Appeals located in Washington, D.C. would severely limit the access of poor disabled

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[9] Diller and Morawetz, *Intracircuit Nonacquiescence and the Breakdown of the Rule of Law: A Response to Estreicher and Revesz,* 99 *Yale L.J.* 801, 813 (Jan. 1990).

[10] While Social Security cases represented a higher percentage of the federal caseload in the mid-1980's when SSA's policies greatly deviated from case law, this is not the case today. Although federal dockets continue to climb, the number of Social Security cases appealed to federal court has stabilized and, in fact, has decreased: 6,483 (FY 1989), 4,668 (FY 1990), 4,869 (FY 1991), 4,782 (FY 1992). See *Overview of Entitlement Programs ("Green Book")* for 1990 through 1993.

and elderly persons to the court. Under the current system, most claimants and their lawyers have relatively easy access to the courts. With a single court located in Washington, would they even be able to appear in court since the journey would become an expensive proposition? In light of the geographical distances and high caseloads, would the court be forced to forego oral argument altogether, as has been the case with the Appeals Council?

Despite the purpose given for creating a single Social Security Court of Appeals, the result would, unintendedly, relegate Social Security claimants to second-class citizenship in the federal court system. The courts should be readily accessible to citizens and should allow everyone, even poor and disadvantaged persons, an equal opportunity to be heard by judges of the high caliber we expect.

V. THE HIGH FINANCIAL AND ADMINISTRATIVE COSTS OF CREATING THE COURT.

The financial cost of creating a Social Security Court of Appeals must be weighed against the questionable effectiveness of the court to achieve its stated objective. The court, if created, would involve expenditures for judges, staff, courthouse space, etc. Should limited resources be committed to that purpose instead of increasing staff at SSA and state agencies? How would creation of the court affect the need for filling vacancies or expanding the current federal courts?

In addition to the direct financial cost, there is an increased administrative cost by focussing on the end of the appeals process (through creation of the court) rather than on the front of the process (ensuring uniform standards through acquiescence or comprehensive regulations). Currently, when courts find that SSA failed to follow circuit case law, the outcome on appeal is normally a remand to the agency for application of relevant judicial precedent and results in a new administrative hearing. In cases where the ALJ and Appeals Council again fail to follow the case law, it is not unusual for a case appealed to court to have three or more hearings. If SSA had applied the correct law in the first place, there would only be a need for one hearing.[11]

VI. CONCLUSION

Everyone agrees that the disability process is in need of repair. However, creation of a Social Security Court of Appeals will not remedy the problems or institute change where most needed, namely, at the administrative levels. Requiring claimants to pursue an appeal to obtain the justice they are due from the beginning will only add to the cumulative delay currently endured by Social Security claimants.

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[11] See Diller and Morawetz, *supra* note 7, at 813-14, for a more in depth discussion of the administrative and judicial costs.

Chairman JACOBS. Thank you, Ms. Zelenske.
Judge O'Byrne.

STATEMENT OF HON. FRANCIS J. O'BYRNE, PRESIDENT, ASSOCIATION OF ADMINISTRATIVE LAW JUDGES, INC.

Mr. O'BYRNE. I want to thank the chairman and the entire committee for allowing me to be here today. My name is Francis O'Byrne. I am the president of the Association of ALJs in SSA.

I am here to testify in favor of this bill because it makes common sense. Rather than reading my paper, Mr. Chairman, I would like to submit the paper and make a few comments on what I have here.

Chairman JACOBS. Without objection, it will be included, sir.

Mr. O'BYRNE. As an American, I believe there should be one set of rules and one law governing all Americans. As a matter of fact, the Social Security Act covers a lot of people who are not Americans, so I should say there should be one rule of law for all people covered by the act. That is not the case now.

It is very difficult to explain to a layman why if you live in St. Louis, Missouri, your case will be paid, and if you live in East St. Louis, Illinois, your case will not be paid. One is the Eighth Circuit and the other is the Seventh Circuit.

I first heard about a difference in the circuits in 1974. So this is not a new problem. I don't remember the facts in the case, but I recall a man came in to see me about 11 in the morning. His mother had a hearing set for the afternoon and he wanted to know if she needed a lawyer. I looked at him and I said, in this case, there is not a lawyer in Illinois that can help you. The law in this circuit is absolutely against her. She does not have a prayer. However, if she lived in California, she would have a pretty good chance of securing benefits. He asked, can we have the case put over? I said yes. They moved out to California. I don't know what happened out there. Diversity is not a new problem.

This bill would correct that problem. Circuit shopping would end. Nonacquiescence would be gone. H.R. 3265 is a great idea. It is long overdue.

Now in theory, the administration can appeal to the Supreme Court. In the real world, it doesn't happen. Before the Social Security Administration can appeal to the Supreme Court, it must get the Department of Justice and the Solicitor General to agree. If they are lucky, they can appeal one or two cases a year. So it is a remedy that is seldom used because it is impractical. H.R. 3265 would cure that because there would be only one circuit court.

I do have a couple of suggestions to make. Number one, the Social Security Administration has a history of "nonacquiescence." When the Social Security Administration nonacquiesces, they say it will obey this decision and pay Mr. Jones in this circuit and Mr. Jones only. If they "acquiesce"—I have one in my pocket from the Eighth Circuit—the administration states that the Eighth Circuit didn't interpret the law correctly and set out its reasoning. Then the administration states it will obey in that circuit.

I believe, because of the history of nonacquiescence, there should be a provision in the bill that the administration not be allowed to nonacquiesce to this court.

I would also suggest that the decisions of this court be binding at every level, including the State agencies, because that is where the process really begins. The problem has been at the front end. Mr. Cardwell said that back in 1974 or 1975. The front end has never been fixed. I believe it has been a matter of cost.

It is very difficult for the people in State agencies to know what the U.S. District Court law is in their own circuit. I don't think they are kept advised.

I also suggest that this court be required to travel to the various circuits when oral argument is involved. Why do I suggest travel? I think this bill is fair, I think it is just, but I don't think this bill would have a chance of passing without that provision. The local bar associations would raise absolute hell if they were required to travel from home to Washington, D.C. I think it just makes a lot more sense if this court would travel to the various circuits when oral argument is involved.

Are there any questions?

[The prepared statement follows:]

ASSOCIATION OF ADMINISTRATIVE LAW JUDGES, INC.

October 21, 1993

Before the Subcommittee on
Social Security

Mr. Chairman:

First let me thank you and all the members of this Subcommittee for allowing me to be here today. My name is Francis J. O'Byrne. I have been an Administrative Law Judge for the past twenty years hearing Social Security cases in Chicago. I am the President of the Association of Administrative Law Judges. The Association is a recognized professional association having the stated purpose of promoting judicial education and due process for claimants seeking resolution of controversies involving the Social Security Administration or the Department of Health and Human Services.

The Association affirms its position that a claimant's right of appeal to the local Federal District Court be maintained.

The Association believes that the provisions of the Social Security Act should be uniformly applied to all covered by the Act. That is not the case now. Because of differing interpretations of provisions of the act, a claimant's residence can determine whether benefits will be paid or denied. The Federal Circuit Courts of Appeal do not always

agree with each other as to the intent of Congress or as to meaning of a particular provision. In some areas, a claimant can be found entitled to benefits on one side of a river and that claimant would be denied benefits if he lived on the other side of the river. That is not fair. We are one people and one rule of law should cover all of us.

In theory, the Social Security Administration (the Administration) could appeal these diverse interpretations to the Supreme Court. Years ago I learned that to move a case to the Supreme Court required the cooperation of the Department of Justice and the Solicitor General. That at most, the Administration could present one or two cases a year before the Supreme Court.

In my opinion, that may be the reason the Administration went into the "non-acquiescence"and "acquiescence" business. In a non-acquiescence case the Administration treats the courts findings as being only applicable to the claimant involved. If the Administration decides to obey the decision in the Circuit involved, it issues an Acquiescence Ruling.

The "non-acquiescence" policy of the Administration was attacked by the American Bar Association in July 1985, Resolution 110. The Congress in 1984, in connection with reform legislation, directed the Administration to re-examine that policy. The Federal Courts Study Commission in April 1990 suggested that the Social Secutity Act be amended to bar non-

acquiescence. Mr. Pickering on behalf of the American Bar Association on May 2, 1991 appeared before this Subcommittee asking that Congress bar "non-acquiescence."

The Association supports the concept set out in HR 3265. It would create a body of law applicable to all people covered by the Social Security Act. A person's place of residence would not be relevant to the issue of entitlement. It would end the "non-acquiescence" merry-go-round where the same issue or issues can be litigated over again. It would reduce the number of class actions filed.

This Social Security Court of Appeals legislation, H R 3265, fills a real need. It would bring us a truly national system of Social Security law. We will have a system that is consistent and predictable.

However, I suggest HR 3265 be amended to ban "non-acquiescence " to decisions of the Social Security Court of Appeals, that the court's decisions be binding at every level of review including the state agencies, and that the court be required to travel to the various circuits in appeals involving oral argument.

Respectfully,

Francis J. O'Byrne

Francis J. O'Byrne
HO Chief Adm. Law Judge At Large
200 W. Adams St. Room 510
Chicago, Illinois 60606

Chairman JACOBS. Thank you, Judge O'Byrne.
Mr. Burgess.

STATEMENT OF ROBERT BURGESS, PRESIDENT, NATIONAL ASSOCIATION OF DISABILITY EXAMINERS

Mr. BURGESS. Thank you. I would start by saying that you have NADE's written statement and I would like to make some comments along with that.

Chairman JACOBS. Without objection, it will be included.

Mr. BURGESS. Thank you. In the 1960s, the program was solid, anchored by a strong central review. Those of us who have been around for a while realize the program has been unstable for the last 20 years. Thousands of unwarranted allowances were granted in the 1970s; thousands of unwarranted denials were made in the 1980s.

NADE agreed with the court's assessment in the early 1980s that many of those determinations were overly stringent. We disagree with the courts over the root cause for that stringency. NADE believes that stringency was and is due to a lack of consistent application of impartial realistic medical assessment.

Courts, on the other hand, in many instances seem to think that procedures will make the difference. For example, one, eliminate the nonsevere step from sequential analysis. That will not change a single decision. Two, give greater weight to the attending physician's opinion. Under what circumstances?

Three, doctors, rather than the disability examiners, must be responsible for the residual functional capacity assessment. We have studies that show that when the DEs or disability examiners are responsible for those assessments, the quality appraisal rating is still good. It makes no difference whether the assessment is done by physicians or experienced DEs who have been trained by physicians.

Four, courts have been concerned about the wording of the way pain is defined and evaluated. That is somewhat akin to searching for the Holy Grail, except there may be a Holy Grail. There is no way to define pain or set out a rule to evaluate it that everyone will agree on and have it fly in every case.

Since the 1980s, the courts have remanded thousands of cases to be evaluated using these and similar procedures. Unpublished GAO studies show that the reversal rate for class members has been negligible at the DDS level, despite these additional procedures.

I realize that that is somewhat suspect because they are unpublished studies, but to go back to the mid-1970s, when these procedures, that is, the 12-month rule, the absence of face to face, the absence of PDNs, etc., the program had the highest allowance rates that we have ever had. So, if the incidence rate is rising now, it has no direct correlation to the procedural mandates of the courts.

Zebley is different because it changes the rules, and the medical improvement standard is different because it changes the rules, not merely procedure.

NADE's goal is to render individually realistic, nationally consistent determinations as expeditiously as possible. The generalist

courts have not helped us to do that. We believe that a Social Security Court could. A court specializing in Social Security law would understand that knowledgeable, impartial medical assessment is necessary to equitable decisionmaking, not just at the DDS level but at all levels.

We hope that, if established, the Social Security Court would encourage SSA to centralize the review function in Baltimore and require that an equal percentage of denials and allowances be reviewed. A Social Security Court would ensure a national, consistent application of the act and regulations and reverse the process of regional fragmentation that is currently going on.

We believe the Social Security Court could better differentiate between those necessary procedures that truly protect the rights of the claimants and those that simply micromanage the DDS, increasing cost, processing time, and claimant frustration. We commend the bill heartily.

[The prepared statement follows:]

TESTIMONY OF
ROBERT BURGESS, PRESIDENT
CARROLL D. MOORE, LEGISLATIVE CHAIRMAN
THE NATIONAL ASSOCIATION OF DISABILITY EXAMINERS

Chairman Jacobs and Sub-Committee Members:

My name is Bob Burgess. I am President of the National Association of Disability Examiners (NADE). Appearing with me today is Carroll Moore, our Legislative Chairman. We appreciate the invitation to appear before you and offer comments regarding H.R.3265, a bill to establish a Federal Social Security Court of Appeals.

We are very pleased with this proposed bill. Our membership views it as a much needed Court that should significantly improve the appellate process. Our members are dedicated to the service of the disabled. Our goal is to render individually realistic, nationally consistent determinations as expeditiously as possible, however, the policies and procedures under which the state DDS's operate determine how well we succeed in obtaining that goal.

NADE has a long history of consistently endorsing the concept of a Social Security Court. As early as 1983, NADE was on record stating that such a court would

> "help lessen the congestion in the federal courts. Judges would acquire expertise in this area because they would be reviewing only Social Security cases. More importantly, it would create a single body of precedent which would be binding at all levels of adjudication, thus increasing uniformity and decision making."

Turning to the subject of Court decisions, NADE agrees with the view that the decisions of the early 1980's were overly stringent; however, if the Courts had understood the root cause that led to this stringency, they could have mandated that an equal percentage of denials and allowances be reviewed. They could have mandated rescission of residual functional capacity (RFC) guidelines such as those contained in SSA 82-51 which compromised the application of impartial realistic medical assessment for individual claimants. Instead the Courts stressed the procedural aspects of due process. For example:

1. The Courts mandated that the attending physician's opinion be accorded greater weight in assessing residual functional capacity.

Former Commissioner Robert Ball testified before the Senate Finance Committee in April, 1992 that this is a "dubious" principle to follow to determine RFC. In my state of Texas most favorable determinations are based on the evidence supplied by consultative examiners. Had we relied on treating sources only, many would have been denied because treating source evidence alone was insufficient. We believe that according weight to the attending physician opinion, unless supported by the total evidence, represents adjudication by the Court's formula.

2. Another "remedy" by the Courts mandated elimination of the non-severe step. i.e. (Bowen v Yuckert, 9th Circuit).

Once it is determined that an impairment(s) is non-severe, a grant will never result from going through the entire sequential trail. Further, if a severe impairment(s) is assessed to be non-severe by mistake, eliminating the non-severe step provides no effective remedy. We were fortunate that the U.S. Supreme Court set this decision aside in 1987.

In the mid 1970's disability examiners operated without many of today's rules and regulations secondary to Court influence. For example, there was

1. No rule for according greater weight to or mandate to purchase examinations from treating sources.

2. No 12-month rule governed the gathering of medical evidence.

3. No personalized disability notices were required.

4. No calls to the treating physician were required to reconcile conflicting evidence.

In the mid 1970's the DDS allowance rate was the highest it has ever been despite the absence of the above requirements. Conversely, in the early 1980's, when most of these procedures were in affect, allowance rates were the lowest in the history of the program.

We stress once again our agreement with the Courts' judgment concerning the stringency of DDS decisions in the early 1980's. However, the procedural remedies have had little effect on DDS decisions. GAO studies have established that the DDS reversal rate for class members is negligible. The answer for the increasing incidence rate is located somewhere other than the mandated procedures which have contributed heavily to higher costs, increased processing time and constituent frustration.

Federal Courts have also rendered decisions that are contrary to the heart of the definition of disability. Walker v Secretary of Health and Human Services is a case in point. Walker applied for SSI disability on October 2, 1987. He returned to work in April, 1988, and he continued to work at least through September, 1988, when the case was heard. The ALJ's denial was affirmed until the Tenth Circuit remanded the case to determine whether Mr. Walker had been disabled five months prior to his return to work in April, 1988. If so, the Court reasoned, the claimant would be entitled to benefits and a trial work period. According to the Court:

> "..a fair reading of the Act indicates that an individual who suffers from an impairment that has lasted, is expected to last, twelve months is entitled to disability insurance benefits, as well as a trial work period, after waiting five months."

The Walker decision does not change DDS determinations by means of a new procedure, but by rewriting something as basic as the duration requirement of the definition of disability for return to work cases. For all practical purposes the Court reduced the duration requirement from 12 to five months.

The only decisions which have consistently changed the DDS determinations have been Zebley and those which led to adjudicating widows(er)'s claims in the same way as disabled workers. In both instances, it was not procedural but rule changes that led to changes in DDS determinations.

Therefore, we believe there are several benefits in establishing a Social Security Court of Appeals. They can be summarized as follows:

1. A National consistency in interpretation of the law and SSA rules and regulations which is lacking with twelve Federal Circuit Courts, plus Federal District Courts issuing conflicting interpretations of rules.

2. The claimants would have greater equity secondary to consistent application of the law. The current appeals process leads to inequities in the treatment of similar impairments from different Circuits.

3. Specialization in an SSA Court of Appeals would produce greater understanding of the evaluation process, the medical basis for decision making, and hopefully eliminate variations of legal interpretations.

4. The Social Security Administration and state DDSs would operate under uniform court rulings.

5. The Social Security Court could provide relief to the Federal Court system by removing these cases from the Federal Circuit Courts.

In conclusion, our Association has consistently been on record as endorsing and encouraging the establishment of a Social Security Court of Appeals. We endorse and applaud H.R. 3265 which seeks to accomplish this. We commend you, Chairman Jacobs, and Representative Bunning for sponsoring and introducing this bill. Again, thank you for giving us the opportunity to come today and express our views.

Chairman JACOBS. Thank you, Mr Burgess.

Mr. Bunning.

Mr. BUNNING. Ms. Zelenske, we appreciate your perspective on this issue, although we have, obviously, a difference of opinion.

Ms. ZELENSKE. Thank you.

Mr. BUNNING. Doesn't your belief in percolation among circuits reflect a vested interest in chaos? You minimize the case numbers pending to something under 5,000. Isn't it true, as Mr. Arner has testified, that because 100 or so of these cases are class action suits, that the actual number is somewhere between 13 and 15 million?

Ms. ZELENSKE. I can't speak to that, and I don't think that there are 100 class actions pending, but I don't have the statistics on that. Fifteen million seems unusually high.

Mr. BUNNING. That is why I asked him the same question, to make sure that his numbers——

Ms. ZELENSKE. And there didn't seem to be a lot of basis for where that figure came from.

Mr. BUNNING. He said that it was more of a guess than anything else.

Ms. ZELENSKE. Currently, the position I have, I try to stay on top of the main class actions that are going on around the country. There aren't 100 class actions. Maybe in the history of the Social Security Act—I know there have been more than that, but currently, that number of cases is not pending.

Mr. BUNNING. Also, you charged that SSA fails to acquiesce in circuit court opinions, yet the Congressional Research Service, at our chairman's request, examined case files. They found no evidence of nonacquiescence, but staff was dismayed at the complexity and confusion they found. Their review is the primary reason that we have advanced this bill.

Ms. ZELENSKE. Do you want me to comment on that?

Mr. BUNNING. Sure.

Ms. ZELENSKE. I am not privy to the report by the Congressional Research Service. I think the problem has been when there have been decisions by circuit—there are two issues to raise here, and this is discussed in more detail in my written statement, so I won't go into it, about the subtle forms of nonacquiescence engaged in by SSA.

SSA only issues acquiescence rulings when it considers there is an outright conflict with its policies.

Mr. BUNNING. They have a book full of those.

Ms. ZELENSKE. The problem is, in many more cases, they don't consider that there is a conflict. They consider it more of a difference based on the facts in the case and they don't issue an acquiescence ruling or they don't come right out and say, we're not acquiescing in the circuit court decision.

At that point, things get a little fuzzy, because from our point of view, as practitioners, when a circuit court speaks on a certain area, and this is true at all the Federal courts on all issues, I mean, at the circuit court level, that is the law of the circuit. There is a problem in getting that communicated back down to the people who are making the decisions at the DDSs.

Now I think I am the only person this morning who has mentioned these pain regulations and the medical evidence regulations. These are both very detailed and have had POMs provisions, provisions in the programs manual for Social Security issued to DDSs. That has tried to take the regulations and distill it at the level for the people who are making the disability decision, and I think that is the way you try to approach it.

Mr. Burgess would probably be able to speak better about how that is operating at that level, but I have seen the POMs that have been issued pursuant to the regulation. But the regulations are very detailed and try to take the best of what was in the vast circuit court precedent on these issues and then tries to communicate it to the disability decisionmakers.

Mr. BUNNING. Mr. Burgess, would you like to comment on that?

Mr. BURGESS. SSA has tried to rewrite the definition of pain and how it is to be evaluated at least on three different occasions. There are three different Social Security rulings on the subject of pain. The bottom line for disability adjudicators is that we are going to adjudicate cases based on how we are reviewed or not reviewed.

The definition of pain is absolutely impossible to be arrived at. The way one evaluates pain is to bring the highest level of expertise possible to bear on all of the pertinent factors in the folder. This is the only way pain evaluation can be done. It is not reducible to a "one size fits all" formula.

Mr. BUNNING. And you suspect that if we did it and had one court that ruled on the appeals level, that it would be more consistent?

Mr. BURGESS. I suspect that the one Social Security court would begin to realize that we must have impartial, realistic medical evidence at the heart of our decision, and I think you would get a lot better decisions, more consistent decisions.

Mr. BUNNING. Thank you very much.

Chairman JACOBS. Mr. Jefferson.

Mr. JEFFERSON. Thank you, Mr. Chairman.

Ms. Zelenske, you raised a question about travel as an issue, the travel a citizen would have to undertake to have access to the court as an objection to these proposals. Isn't there a problem now with this travel issue from a different point of view? That is to say, there are people who are reportedly advised by their attorneys to travel to one circuit or another to obtain a more favorable opportunity. Forum shopping is what it is generally called. For those folks who can do that, it is available to them. For those who can't, it is not.

That is a problem under the present system. How do you respond to that?

Ms. ZELENSKE. I am glad you raised that, because my ears perked up when I heard that. I absolutely and fervently disagree with that. I really don't think that people move across country to try to obtain more favorable determinations under the case law.

First of all, people don't know what the circuits courts are deciding. I think Mr. Houghton said that earlier, that people aren't familiar with the differences at their circuit court level.

Mr. JEFFERSON. Their lawyers know, though, don't they?

Ms. ZELENSKE. Yes, but I think you would be getting seriously close to violating your professional duties if you advised a client to do something like that. Certainly in representing hundreds of clients and supervising many people, I have never seen that happen.

Mr. PICKLE. Would the gentleman yield?

Mr. JEFFERSON. Yes sir.

Mr. PICKLE. In line with that question, how often does a circuit court hear oral arguments?

Ms. ZELENSKE. Actually, fairly often. I think the practice might vary from circuit to circuit——

Mr. PICKLE. Can you tell me how often?

Ms. ZELENSKE. In my experience with the Fourth Circuit, which is really all I can speak to, we almost always had oral argument.

Mr. PICKLE. Usually they are appealed on facts, and very seldom, as I understand it, does a claimant actually go before the circuit court. It is not a problem. If it is a problem, we would like to have those facts. If it is not, then travel really isn't a problem in that area, in my judgment.

Thank you, Mr. Jefferson.

Ms. ZELENSKE. I know that in every case that came out of our office, the Legal Aid Bureau—well, not every case, I'll say 99 percent of the cases, we did have oral argument at the Fourth Circuit on it and it was not submitted on a brief or where they made a decision prior to that.

Mr. PICKLE. I think, Mr. Chairman, we might try to establish factually, if we can, how often they actually have oral arguments on the circuit courts. I think that would be an interesting fact to have established for us.

[The following was prepared by the subcommittee staff in response to Mr. Pickles' request:]

According to the Administrative Office of the United States Courts, U.S. Courts of Appeals ruled on the merit of 513 Social Security cases in fiscal year 1992. Of these 513 rulings, 367 (or 72%) were issued after the submission of briefs, while 146 (or 28%) were issued on the basis of oral arguments in addition to written submissions.

Mr. JEFFERSON. Right now, the only way to achieve uniformity of decisionmaking—I guess everyone seems concerned about uniformity. The question is how to achieve it. The only way now to achieve it is to have the Supreme Court make a decision about the cases, isn't that right?

Ms. ZELENSKE. That is one way to have that happen. That certainly was the case in the *Zebley*——

Mr. JEFFERSON. I am talking about under the present law, without anything else changing today. Isn't that the only way——

Ms. ZELENSKE. No, it isn't. That is one way that it can happen. Another way is for Social Security to promulgate regulations, as it has in the medical evidence area and in pain. These regulations apply nationally. There is one circuit court decision, and I discussed this in my written statement.

The Second Circuit has addressed the validity of the medical evidence regulations, because the Second Circuit had a vast and fairly liberal case precedent on how you weigh medical evidence. They were squarely presented with the issue of what do you do with regulations that in certain part conflict with circuit case law, and are

you going to uphold them? The Second Circuit said, yes, we will, as a whole. They are reasonable, they are not arbitrary and capricious, and they are valid and they will be binding on the court.

That is the only circuit that has spoken to that issue up to now. I would suspect that given how liberal the case law was in that circuit——

Mr. JEFFERSON. That hasn't been done, the promulgation of regulations. If that doesn't get done, we don't meet the uniformity argument that everybody seems to think we need to get taken care of.

How do we move the administration to that point? It hasn't done it yet, and it apparently has the authority to do it.

Ms. ZELENSKE. I think these two areas where they have promulgated the regulations have probably been the biggest areas of concern about nonacquiescence over the last decade. I think the vast number of cases, of disability cases, seem to turn on those areas, and that the regulations over time will come to address this.

I don't know how you move the administration to do that.

Mr. JEFFERSON. I guess my point is that something needs to be done in addition to what is being done now, and that is what we are debating here. The remedy you suggest is one available apparently to the administration that isn't being undertaken, and we are at a loss as to how to make it move, or apparently, so far we are.

Let me ask you another question about acquiescence or nonacquiescence. This is another area, I guess, where if the administration acted uniformly, it wouldn't solve the problem but it would be of great assistance. One of the remedies you argued for against this court system is a reformation or repeal, I think it is——

Ms. ZELENSKE. I am sorry, it is what?

Mr. JEFFERSON. You argue for the repeal of the acquiescence opportunity by the administration, don't you? I think you do on page 4 of your testimony here. At least you point to a history of the Ways and Means Committee—I don't mean to ask any more questions, Mr. Chairman, I will just finish up with this one—the history of the Ways and Means Committee having at one time urged a repeal of the House-passed legislation to cease its policy of acquiescence. It is on page 4.

Ms. ZELENSKE. Right, right.

Mr. JEFFERSON. Are you urging that the Congress take that as an approach to dealing with this problem?

Ms. ZELENSKE. I think it is an issue that has to be addressed. I think what Congress recommended back in 1984 was that the agency stop nonacquiescing and either decide to appeal, to try to take the case to the Supreme Court for ultimate resolution, or apply the policy at all levels. I think those were the final recommendations of the conference committee there.

Mr. JEFFERSON. Is that your recommendation? That is what I was asking.

Ms. ZELENSKE. Is that my representation?

Mr. JEFFERSON. Is it your recommendation?

Ms. ZELENSKE. My recommendation? I think it needs to be resolved, although, and I don't know if I have made this clear, I am not sure that the differences are all that great right now. I think

these regulations will serve to address that because I think they are in the main areas.

Mr. JEFFERSON. Thank you, Mr. Chairman.

Chairman JACOBS. Mr. Houghton.

Mr. HOUGHTON. If I understand you, Ms. Zelenske, you are saying that the system isn't broken, and so therefore don't fiddle with it. If you do, it will cause delay and costs and inconvenience, and the real problem is in the administrative function. Is that right?

Ms. ZELENSKE. Yes, I think——

Mr. HOUGHTON. Now that being the case, let me ask you a basic question, and I don't mean to try to dredge up an argument which really doesn't exist. Is there an element or sort of professional jealousy in here between the doctors and the lawyers?

Let me just give you an example. Here you have a situation where former Commissioner Robert Ball said the system is flawed and there is an erosion of the strict standards of disability determination. One of the reasons I think he said that is because of the increasing importance of the evidence of the local doctors and physicians versus the established procedures of government consultants.

I don't know whether it is a legal issue in itself to create a better and more efficient and more effective system or whether there is something between the medical and the legal profession. You might like to make some comments on that, anyone.

Would you like to, Mr. Burgess.

Mr. BURGESS. I believe that the definition of disability at base is a medical definition. The way decisions are made in my opinion is that the medical and legal aspects must work together, but respect each other's domain. The medical aspect is analogous to the heart. The legal aspect is analogous to the skeleton. Once the residual functional capacity assessment is determined by using medical expertise as the heart and soul of it, the legal aspect acts like a skeletal framework that directs the decisionmaker in the application of the law to that assessment.

If the medical or legal aspects encroach upon each other, big trouble occurs, and that is exactly what is happening in the program today. We don't have a decent review. We don't have a good application of the medical assessment to this program anymore. The legal people are trying to mandate broad legal procedures in which everything must be made to fit. This is where we are having a problem, and yes, I do believe there is a difference between the legal and medical points of view on this.

Mr. HOUGHTON. Would anybody else like to comment on that?

Mr. O'BYRNE. I have been an ALJ since 1973, and inch by inch, or centimeter by centimeter, very slowly, the program is being slowly taken over by the treating doctor. I don't think that is what Congress really wanted to happen. We all know that there are treating doctors who are great.

Mr. HOUGHTON. Despite the fact that they may have more personal and immediate knowledge of the problem.

Mr. O'BYRNE. That is often true, but I remember in the early days of the black lung program some of the doctors in some of the small towns had their lights shot out on their front porch when

they would come up with a report that there was nothing wrong. Medicine is very competitive now.

Mr. HOUGHTON. As contrasted to law?

Mr. O'BYRNE. Patients are customers.

Mr. HOUGHTON. As contrasted to law?

Mr. O'BYRNE. No, the law, God help the young students coming out. I get young people coming to see me for a job and their credentials are beautiful and there is no work out there. It is rather frightening.

In fact, they come to me and their credentials are far better than I had when I applied for a job. I am not sure if I could get through law school now. Those young people coming out, they are really good. Thank God I snuck in. Of course, in another couple years, I will probably be gone.

Chairman JACOBS. Mr. Pickle.

Mr. PICKLE. Mr. Chairman, as we all know, one of the biggest problems we have is the large number of cases that can't seem to be heard. We already have some 800,000 on appeal now, and within the next few months it will be in excess of a million. That is unacceptable. That is intolerable.

Somehow or another, we have to move it up, increase the speed of processing, and I think probably the appeals process is part of the problem. At least, we have to clear up this backlog in some way.

I am wondering how any of you might feel about the process of, up front, trying to get the evidence established more quickly. How do you feel about face-to-face interviews at the beginning point, doing away with reconsideration, getting right to the case?

Mr. O'BYRNE. I believe the GAO did a study on face-to-face interviews some years back and I believe the study came out and said it was effective but it was costly.

Mr. PICKLE. It was what?

Mr. O'BYRNE. It was costly, because the interviews were to be done by the States. In Illinois, our State agency is in Springfield, and probably the vast majority of the claimants live in the northern corner of the State, around Chicago. Are those State agency people going to be coming up to Chicago, or are the people from Chicago going to be going down there? I think the cost factor is what killed that. I think the idea is good.

Mr. PICKLE. You are quoting the GAO. Do you think the cost factor would be enormous?

Mr. O'BYRNE. I can't answer that. I am sorry I can't give you a decent answer on that. The administration considers it expensive.

Mr. PICKLE. Mr. Burgess or Ms. Zelenske, how do you feel about face-to-face interviews?

Ms. ZELENSKE. I would like to say something about that. I think several years ago, Mr. Jacobs introduced a bill that would eliminate reconsideration and would institute face-to-face interviews only if you were going to be denied. Both of those were recommendations of the SSI modernization report, chaired by Dr. Flemming.

I think the bill that Mr. Jacobs introduced several years went a long way toward addressing the kinds of problems that I see at the front end of the process.

I just wanted to say that the face-to-face interview is what takes place now with continuing disability reviews when someone is going to be terminated. From what I know about it, it has worked very effectively.

Mr. PICKLE. Mr. Burgess.

Mr. BURGESS. I have a couple of comments. First of all, on the expense, GAO ran studies in California which showed that—they did a face-to-face study at the reconsideration level, and GAO said that if 80 percent of the people opted for the face-to-face that were eligible for it, it would take a 17 staff year increase to do it.

Mr. PICKLE. I didn't hear the last part.

Mr. BURGESS. It would take a 17 staff year increase to do it. That was at the reconsideration level. If you shift that to the initial level, you are looking at over a 50 staff year increase to do it. The cost estimated by OMB or GAO is going to be roughly $6 to $7 billion to do face-to-face at the initial level.

Mr. PICKLE. I presume, then, we have to make——

Mr. BURGESS. I am not a financial expert. I am just quoting others on that.

Mr. PICKLE. We have established that the cost wouldn't be a burden, or it is just a complaint of administrative law judges that they don't want to have to move that quickly on establishing evidence. I rather have a feeling we have to revamp how we hear these cases and the speed in which we handle it, because we are being suffocated, we are being eaten up by the volume of cases, and we are not making any progress.

If it is a cost factor, I still wouldn't dismiss it if it can be handled. I am trying to get some kind of a demonstration in my own State to see if we can't push it up and see how it works. Nobody knows. Everybody says, oh, the cost, you can't do that. You can't let them establish their evidence right at the beginning, we have to wait.

I have a feeling that we ought to try to find a better way, and I am personally trying to push that part of review, but I think we do have to establish factors——

Mr. O'BYRNE. I think we are all on your side, sir.

Mr. BURGESS. Relative to the quality, let me say this. If we were to go to face-to-face at the initial level, I don't see how you could possibly get enough disability examiners with the type of experience that it would take to hold those hearings. That is kind of an X-factor. I am not sure this has been considered.

I would also say that I am a hearing officer and I have held about 200 to 300 hearings face-to-face myself.

Mr. PICKLE. But it doesn't bother you that sometimes a claimant complains, it was 3 or 4 months later before I was ever asked to submit any evidence?

Mr. BURGESS. Of course it does, but right now I am just addressing the quality aspect of it. And yes, that does bother me.

Mr. PICKLE. That ought to bother all of us.

Mr. BURGESS. I will make a statement about that in just a minute.

With regard to face-to-face, the actual seeing of the claimant has not helped me as much as the latitude that I have been given to make the decision. What I believe to be important in the face-to-

face is the testimony. Does it really add up, vis-a-vis the medical and nonmedical evidence that is in the file? Then I can make the decision. What I see in front of me is really not that compelling. Does this limp that I see last for 8 hours a day, 5 days a week? Even if it is a permanent limp, how can its significance be known if I cannot assess the medical evidence?

Mr. PICKLE. In the process, we have tens of thousands of cases building up all over the country, and we have to change the system in some way or another. We have to speed up the process, and I think the appeals process is part of it.

Mr. BURGESS. Let me give you a suggestion on cutting down the processing time. The procedures that I mentioned earlier, that is the 12-month rule and the others, if those were eliminated, we could save at least 20 days in processing time at the State agency level without a reduction in quality.

Chairman JACOBS. Mr. Brewster.

Mr. BREWSTER. Thank you, Mr. Chairman.

Can any of you tell me how many disability cases are filed each year?

Mr. O'BYRNE. I can tell you how many are pending.

Mr. BREWSTER. No, how many are filed each year is what I am curious about.

Mr. O'BYRNE. I don't know how many are filed each year. At the end of financial year 1993, we were informed that there were 508,000 cases pending hearing. I have 400 and some cases on my docket right now. That is the highest I have ever had. I would say that in an average month, I close about 30 a month. I have enough work in my office right now to keep me busy for almost a year.

Mr. BREWSTER. Would there be——

Mr. O'BYRNE. I am taking every short cut possible, but we are bogged down in many, many ways. The judges have to develop files. If you don't, you are in trouble. You can hear a case and a denial goes out, and thereafter a medical report comes in, and the case will be reopened. The cases just are very difficult to close.

Mr. BREWSTER. Yes.

Mr. O'BYRNE. There are going to have to be some changes. For example, when the hearing is over, no more evidence should be received. There has to be some finality somewhere so we just don't keep moving cases back and forth in the system.

Mr. BREWSTER. Would there be as many as 1 million cases filed a year out of the 250 million population we have?

Mr. BURGESS. The last figure that I saw was in 1990, 2.2 million.

Mr. BREWSTER. Two million?

Mr. BURGESS. Two-point-two million.

Mr. BREWSTER. Two-point-two million, and the cost would be $57 billion to do face-to-face interviews, so that is a cost of about $27,000 per person, right? It would nearly be cheaper just to put them on.

I wonder what percentage are approved when they are filed. It seems like in Oklahoma, nearly none of them are, and knowing some medical histories on a lot of the patients—I am a pharmacist by profession and have known many of them individually for many years, know their medical histories—many go to their physicians, their personal physicians, their general practice doctor, their cardi-

ologist, people who have treated them for years that have very strong statements as to the credibility of this particular patient, and then go to a doctor who sees them for the first time and immediately turns everyone down. I don't know if that is common across the country. It is common in Oklahoma.

One constituent who had been a freight dock worker had a leg cut off in a motorcycle accident, had an eighth grade education, 50-something years old. He goes to the doctor who says, it is obvious you can't go back to do that but go get a desk job somewhere. This is a guy with an eighth grade education.

Another particular constituent I remember was a bulldozer driver, a heavy equipment operator. He had a bypass surgery that went wrong and was told to get a job as a toll taker on turnpikes. That would be great, except we don't have a turnpike within 100 miles in any direction.

I think our whole system is broken. I am not sure where in the process this appeals circuit court makes sense to me, in that it would have a standard across the country that would be the same. I don't think our standards are the same across the country.

But our system is broken as far as I am concerned. Sure, I am positive there are some phonies out there, but I think many people—in fact, I have had numerous constituents die before they ever had their case adjudicated.

Mr. O'BYRNE. Mr. Brewster, that case you mentioned, the first one, if I handled that case, it would be an OR. My hearing assistant would bring it to me, and she is right about 75 percent of the time. OR means on the record, no hearing required. We pick up the phone, we call the family, and tell them to relax. The judge has their case and benefits are going to be paid.

Mr. BREWSTER. But Judge, by the time it ever gets to you it has been 2 or 3 years down the road.

Mr. O'BYRNE. Not that long, sir.

Mr. BREWSTER. In Oklahoma, it takes a while to ever get to that level. I have concerns about our entire system. I certainly appreciate what you have to say about that.

Mr. O'BYRNE. I am delighted all you folks are interested. I have been in PI work since 1952. This is one of the most beautiful programs that this country has ever devised, where someone has a work record and something happens and the poor guy is disabled. We have a country that will help him. It is beautiful. We have to keep it alive.

Mr. BREWSTER. But they will help him because he has paid money into it all these years. It is his money, too, that he is trying to get back, as well as his employer's. Sure, we need to weed out every phony out there. I think all of us are very interested in that. But you have a lot of legitimate people who can't get any help with their own money, and that certainly seems to be a problem to me. I think this may be a start in the right direction.

Ms. ZELENSKE. Mr. Brewster, can I just make two quick points on that?

Mr. BREWSTER. Sure.

Chairman JACOBS. You are a little on the defensive here today. You need a little more time.

[Laughter.]

Ms. ZELENSKE. I would just like to say something more on the offensive.

On the face-to-face interviews, in Mr. Jacobs' bill, and I think what people are talking about is not having it in every single case. It would only occur in cases where somebody was going to be denied. You said you never see any cases get awarded at the initial level, and it does seem that way. I think the statistics are about 40 percent of the applications are awarded at the initial level. You might be able to——

Mr. BREWSTER. Can we get that information?

Ms. ZELENSKE. Social Security publishes it.

Mr. BREWSTER. For my State.

Ms. ZELENSKE. I am sure they break it down by State. There are some cases awarded at the initial level. At any rate, we are not talking about having the face-to-face hearings in every single case.

Second, the bill that Mr. Jacobs introduced several years ago also dealt with how medical evidence was obtained. From my point of view, and having seen cases at every level, that is the problem, and I think that is the critical problem in whether cases get awarded at the initial level or before an administrative law judge. A lot of it has to do with what information you ask people.

Mr. BREWSTER. Thank you.

[The information follows:]

DISABILITY ALLOWANCE RATES—INITIAL LEVEL—OKLAHOMA

Fiscal year	National (rounded)	Dallas region (rounded)	Oklahoma (rounded)
1992	44	38	38
1993	39	33	34
1994[1]	36	29	29

[1] Cumulative year to date as of January 1994.
Source: DDS Performance Reports—September 1993 and January 1994.

Chairman JACOBS. Ms. Zelenske, I just have one question, and I suppose we will be done. Did Judge O'Byrne's suggestion concerning travel comfort you somewhat in your concern, his suggestion about the circuit court traveling through the country to hold court?

Ms. ZELENSKE. If it would be able to travel to every single site where circuit courts currently sit. For instance, in the Fourth Circuit, their seat is in Richmond, but on occasion they will travel to Baltimore and they probably travel to other cities.

The problem with that, though, probably the financial end of it enters into it. I know the Appeals Council has been trying to institute some travel and getting out into the field and having oral arguments, and while they have tried to do it, they have only been able to travel to a few locations for financial reasons. There just isn't the money to get around.

Chairman JACOBS. But I think as a matter of ratio, if there are enough Mohammeds, then the mountain goes to them. It works in economy ultimately, I think. I presume that the schedule would be that when it sat in Chicago, it would be there for a while and take

quite a number of cases in Chicago, hear a number of cases, and then move onto another place and schedule them in that way.

I think it is a very useful suggestion that Judge O'Byrne made. Will you at least say it is useful?

Ms. ZELENSKE. No, as I said, it is a positive that a court would be able to—if it were located everywhere that the circuit courts are located now.

Chairman JACOBS. This has been a very, very stimulating panel, unusually so, and we appreciate the testimony of all of you. You have enriched the record greatly. In the end, we will probably certify our record to the Judiciary Committee, which has a lot more to say about it than we do, but they will know about it, and so will we. We appreciate the testimony of everybody.

Thank you very much.

[Whereupon, at 11:34 a.m., the hearing was adjourned.]

[Submissions for the record follow:]

CHARLES W. ARDERY, JR.
3343 DEVEREAUX DRIVE
INDIANAPOLIS, INDIANA 46208

Ways and Means Committee
House of Representatives
B-316 Rayburn House Office Building
Washington, D.C. 20515
October 18, 1993

Dear Members of the Committee:

By way of introduction, I am an Administrative Law Judge of the Office of Hearings and Appeals, Social Security Administration, and have been such for fourteen years.

I am sorry that I could not appear before you personally at your hearing concerning a bill to establish a Social Security Court of Appeals, but I have four hearings on the date of your hearing and feel that it would be unfair to the claimants in those hearings, who have waited at least three months for said hearings, to postpone the hearings and re-schedule them another two or three months later. I hope you will understand my position concerning my non-appearance.

During my years of service, I have noted a significant diversity among the various Circuits which make up the Court of Appeals, in Social Security decisions. The Appeals Council has attempted to weave a body of law around these diverse decisions. However, this has been very difficult and has not prevented significant diversity in treatment of claimants located in different parts of the country even though the program is Federal and should be the same for everyone.

Accordingly, I have come to the conclusion that the only way to have equal treatment for all claimants is to have one court on top, subject only to review by the Supreme Court of the United States.

Thus I propose the creation of a Social Security Court of Appeals on the same level as the Federal Court of Appeals with its various

circuits, except that this court will be only one court and will have exclusive jurisdiction of all Social Security appeals from the various District Courts throughout the country. In this way all Social Security claimants will be treated equally, there being no diversity of treatment by various circuits which is the case at the present time. The appointment of the judges to this Court would be in the same manner as is the appointment of judges to the other circuits of the Court of Appeals, by the President, subject to Senate confirmation.

I have heard some discussion that such a court should be created which would be on a District Court level, subject to review by the various circuits of the Court of Appeals, depending upon locality. I feel that this would be a waste of effort and money as the same problem would exist as exists currently, the diversity not being aided by the creation of such a court.

I have submitted three other propositions to Honorable Andy Jacobs which, if the Social Security Court of Appeals were created, would more than likely result in a saving of more than enough money to pay for the Court, specifically Propositions 2, 4, and 5 submitted to Congressman Jacobs. Since this particular hearing, as I understand it, is limited to the consideration of the Social Security Court of Appeals, I will leave it to Congressman Jacobs to present my other propositions to you in his discretion.

Thank you very much for your consideration of this letter. Thank you also for considering the possibility of a Social Security Court of Appeals, it really being needed at this time..

Sincerely,

CWA:Self

Charles W. Ardery, Jr.

David R. Bryant

ATTORNEY AT LAW
SUITE 1625
180 NORTH LASALLE STREET
CHICAGO, ILLINOIS 60601-2671

GENERAL PRACTICE
SOCIAL SECURITY

FAX (312) 263-3746
TELEPHONE (312) 263-3031

October 25, 1993

Congressman Andy Jacobs
Rayburn Office Building
Independence and South Capitol Street, SW
Washington, D.C. 20515

RE: H.R. 3265

Dear Congressman Jacobs:

In general, I oppose a Federal Social Security Court of Appeals. I do not agree with "some observers" that "fragmentation could erode the national character of the Social Security disability program and institutionalize disparities in treatment of similarly situated claimants."

If such a Court replaces the Courts of Appeals in the 12 Circuits, Judge Posner would applaud but Judge Mikva would dissent. If the legislation expanded its scope, similar to the German experience, to all claims of disability, whether VA, Civil Service, Black Lung, Railroad Retirement, ERISA, private insurance, Federal employees, this might make some sense. The same arguments of "fragmentation" could be made in each of these instances as well.

Yet there is no evidence, borne out by the Court of Appeals for the Federal Circuit, that there is any less fragmentation in international trade or claims or intellectual property than there was before the Federal Circuit Court of Appeals was created. I suggest you ask these judges and practitioners for their frank opinions on whether this "model" Court has accomplished such a purpose.

If Social Security wishes to create a "national" policy, then easier ways exist. Either obey Court orders or file an appeal to resolve conflicts between/among Circuits. Instruct states to do their jobs correctly in making disability decisions or federalize the process. The tinkering at the top will not solve basic problems at the bottom. The $300 million increase in budget for

States ($100 million), technical services (i.e., computers - $100 million) and appeals (i.e., OHA - $100 million) was a good start. What happened? Do you really think "reinventing government" will help a Zebley child, or disabled steelworker who can't afford a doctor? Get serious.

The broad brush approach to resolving problems is also suspect. If "disability" is to be redefined in terms of ability to function in society (ala Zebley) as contrasted to an ability to do a job (presently), you will break the bank. In absolute numbers, jobs will decline. Less people will do more work. What happens to those who are perfectly willing to work but can't find a job? Or the flip question: What happens to those who are able to work but don't want to? What is the sense of vocationally retraining people for jobs that don't exist? Where is the cost/benefit analysis?

In addition to decreasing jobs, there is a concomitant increase in documented illnesses. The "disabled" population is increasing, getting younger, and living longer. If President Clinton's Health Care Reform package goes through, even in a modified format, access to diagnostic medical providers will be readily available to a portion of the disabled population that have never been able to obtain benefits due to a problem of "proof."

Finally, the press of more customers for Social Security on an overworked staff will prevent mandated programs from ever being done. What happened to "cessations"? Who audits Rep Payee forms? How many 12.09 substance abuse disorders are monitored for program compliance? If QAR is so good, why do ALJs reverse State Agencies at a 60% rate? What action has been taken against any State for failure to comply with policy mandates (i.e., Wisconsin)?

A disability court (Article I or III) has been discussed to death. See: Burff, "Specialized Courts in Administrative Law," 43 Ad Law Rev. 329 (Summer 1991); Arner, "The Social Security Court Proposal: An Answer to a Critique," 10 Journal of Legislation 324 (1983); Ogilvy, "The Social Security Court Proposal; A Critique," 9 Journal of Legislation 229 (1982); ABA Rec. to House of Delegates (8/84) attached with advocacy letter of Rudolph Guiliani, U.S. Attorney for New York.

Thank you for your attention to this matter.

Very truly yours,

David R. Bryant

DRB:paz

LEGAL ASSISTANCE FOUNDATION OF CHICAGO
• 1661 S. Blue Island Ave. • Chicago, IL 60608•
• (312) 633-9890 • FAX (312) 421-4643 •

STATEMENT OF NANCY KATZ, REBECCA SAUNDERS, AND THOMAS YATES, LEGAL ASSISTANCE FOUNDATION OF CHICAGO TO THE SUBCOMMITTEE ON WAYS AND MEANS, UNITED STATES HOUSE OF REPRESENTATIVES

H.R. 3265 -- CREATION OF SOCIAL SECURITY COURT OF APPEALS

The Legal Assistance Foundation of Chicago, on behalf of indigent clients in Chicago, writes in opposition to H.R. 3265, a bill that would substitute a court of appeals to hear Social Security claims for regional courts of appeals.

The Legal Assistance Foundation of Chicago ("LAFC") provides legal representation to the poor in the City of Chicago on most civil legal matters. LAFC represents hundreds of persons on Social Security and Supplemental Security Income ("SSI") issues each year. In that capacity, and in representation of such clients, its staff attorneys submit this statement.

Advocates of creation of a single court of appeals to handle appeals of Social Security decisions rendered by federal district courts stress the need to create a uniform body of case law and to guarantee that the claims of similarly situated claimants are treated without regional disparity. We take no issue with these goals. However, as we set forth below, we believe that creation of such a court will hamper, rather than advance these goals.

First, the case law of different circuits has been, in significant part, uniform. The various courts of appeals have taken similar, if not identical, positions on application of the severity step, the treating physician rule, and jurisdiction over class actions under 42 U.S.C. § 405(g), to name a few examples. The difference in interpretation has arisen between the courts of appeals and the Social Security Administration ("SSA"), which has pursued a policy of non-acquiescence in appellate decisions.

Moreover, some differences are beneficial to the Social Security system. The process of "percolation," in which more than one court passes on issues, often arising from slightly different factual backgrounds, has contributed to a fuller development of the law. Indeed, resolution of the various lawsuits that preceded the Supreme Court's decision in Sullivan v. Zebley aided the development of the issue presented--whether the standard for evaluating children's disability complied with the Social Security Act. These cases, which raised the issue in different factual circumstances, allowed full development of this issue. Limiting all appellate inquiry to one court would negate this.

In addition, creating one appellate court will not guarantee that one uniform standard will be applied to all social security claimants. The disparity in standards has largely resulted from SSA's nonacquiescence policy which led to two sets of standards, those applied to claimants in the administrative appeal process, and those applied to the few who exercised their right to judicial review. Creation of one appellate court does not guarantee that SSA will follow all its decisions.

Finally, we question whether a specialized court, limited to hearing social security claims, would be as capable as the regional courts of appeals in objectively judging SSA. Social Security law does not exist in a vacuum. We believe that regional courts of appeals, precisely because they address other issues, are better suited for judging the actions of SSA.

Moving the courthouse door to Washington, DC will make it more difficult for claimants and their advocates in Chicago to pursue their claims to the appellate level. Many Social Security claimants and all SSI claimants are indigent or near-indigent; neither they nor their attorneys, often federally funded legal services programs such as LAFC, have the resources to go to Washington for oral argument. And, the alternative, foregoing oral argument will lead to less than full development of issues at the appellate level.

For these reasons, we oppose replacing regional courts of appeals with a single appellate court of appeals to hear and judge Social Security claims.

Subject: H.R. 3265
To Create a Social Security Court of Appeals

Contact: **Joel D. Leidner**
Legislative Aide,
Los Angeles County Bar Association, Social Security Section
4622 Hollywood Boulevard
Los Angles, California 90027

Telephone: (213) 664-5670

Introduction

The Los Angeles County Bar Association, Social Security Section unanimously opposes H.R. 3265. It is the opinion of the Social Security Section that the creation of a national five judge panel to which appeals will be taken from the District Court will lead to the stultification of the law in the area of Social Security with the result that eligible wage earners and their entitled beneficiaries will be denied the benefits for which they worked. The Los Angeles County Bar Association, Social Security Section is fearful that H.R. 3265 will deprive those who contributed to the Social Security System of their rights to a return on their contribution. In effect, the creation of such a panel as is proposed has the strong potential of depriving people of their rights to their own property - Social Security benefits - without due process of law.

The Los Angeles County Bar Association is the largest voluntary bar association in the United States, with over 26,000 members. While the Social Security Section was not afforded time for protracted deliberation of H.R. 3265 because of not having received notice of the pendency of the hearing on the bill until October 27, 1993, the full Section deliberated on November 2, 1993 and, to a person, opposed the creation of a special Social Security Court of Appeals.

While the Social Security Section would appreciate the opportunity to expand on and enlarge upon the remarks that follow, and would welcome the opportunity to testify in either open or closed session of the sub-committee proposing H.R. 3265, the following remarks represent some of the reasons for our opposition.

A Court of General Jurisdiction Is Best Suited to Decide Social Security Issues.

We strongly believe that a court of general jurisdiction is best suited to decide appeals from the District Court because the judge enjoys a diverse calendar, including complex civil, criminal, and administrative matters. This diversity strengthens, rather than weakens the judiciary, because it allows the judges in the various Circuits to approach Social Security cases utilizing a breadth of knowledge and considerations that would not be brought to bear by a court of limited jurisdiction.

Critical issues which arise in Social Security cases may not be settled by only applying principles from other "Social Security" cases. The judiciary often looks to principles of law which developed in non-Social Security cases. Frequently, due process issues are raised in Social Security cases, as are issues of contract rights, paternity, proper interpretation of state laws affecting offsets or definitions of limitations and other issues too numerous to mention. It is this very diversity of cases which judges of the various Circuit Courts of Appeal deal with that results in the dynamic of the law continuing to evolve.

We are greatly concerned that a single jurisdiction court will "burn-out." A judiciary which reviews only one type of case, eventually, becomes quite limited in the issues that it is willing to consider, resulting in *pro forma* decisions, which tend to become ingrained in a "mantra". This can be seen in the language used in decisions of administrative law judges, which has become so ingrained as to be programmed into a computer for repetition in each decision. The judiciary ceases to be able - or willing - to compare due process and procedure of one administrative agency to that of another, or to go beyond the narrow area of legal rubric with which they are familiar.

Diversity Among Circuits Is Desirable

While the Social Security Act is the same for all U.S. citizens, individuals look to the courts to resolve disputes under the law, as well as to interpret the law, and to see that the Secretary's regulations are implemented properly. This process cannot be kept free from abuse if relegated to just a few.

U.S. citizens who pay into the Social Security system have the right to look to the full federal court appellate body. Our government, our executive, legislative and judicial branches owe full access to the federal appellate courts to all citizens. We cannot create a second class "poor man's court" so that certain favored interpretations of the Act are implemented. This would be little more than an instance of the executive branch trying to control the judicial branch as well as each individual's access to the courts.

Our appellate court system has thrived on the theory that 'more minds have more to offer than fewer minds.' Different issues arise at different times in different regions of this nation, and they properly should be addressed by members of the judicial bench chosen from the region of each individual claimant. While the rights and concerns of the individuals are protected under this system, the interests of uniformity are not overlooked. Review of appellate court opinions reveal that the circuits will look to the opinions of other circuits when a common issue of uniform impact is in question. Social Security appellants need a full appellate court system.

Impact Cases Will Be Less Likely Under H.R 3265

The Social Security Act has a vital impact on the individuals of this nation, including disabled children, surviving children, surviving spouses, disabled workers, and retired workers. We cannot relegate the interpretation of an individual's rights under the Social Security Act to less that what the full federal appellate court system offers.

The struggle to keep access to the judicial branch free from inappropriate executive and legislative branch interference has spawned cases having a major impact on constitutional issues and administrative issues affecting every citizen in this country. In order to preserve citizen's rights to continuing judgments impacting many - we cannot reduce the number of appellate minds which consider such vital issues to our citizens. There are just too many issues for such a limited body to consider.

Vital issues resulting in impact cases from the various circuit appellate court cases have considered such diverse issues as right to due process notice, procedural and substantive due process, weight accorded to evidence, burden of proof, interpretation of regulations in the U.S. Code of Regulations, and the substantial evidence standard. From 1975 through 1990, individuals have looked to, and needed a full appellate court system, to go forward with cases of great impact affecting the Social Security claimant's of this nation. For example, during

this period, the Ninth Circuit went forward with around 200 impact cases, the Second Circuit went forward with around 160 impact cases, the Third Circuit went forward with around 200 impact cases. It is neither rational nor realistic to place such a burden on a small appellate panel such as the one proposed. If anything, the needs of the growing populations in each circuit will increase.

Federal appellate judgments from the various circuits of our judicial appellate court system have a profound impact on individuals and members of class actions across our nation. To bar access to the federal appellate courts is to deny the hope of due process to every individual - every worker, every spouse, every child, every disabled individual every aged individual - with an interest in our Social Security Act.

One of the primary concerns that the members of the Los Angeles County Bar Social Security Section is with the potential loss to the legal process. The common law heritage of this country is marked by the exchange of ideas, the slow molding of important legal principles, and the overall improvement of the substantive law. The claimants, the Social Security Administration, and representatives currently enjoy the benefits arising out of the occasional input of every member of the various Courts of Appeal. One need only look at the number of cases that the Supreme Court has decided in the last 10 years to find that complex questions cause reasonable minds to differ. The inter-circuit conflicts allow the exchange, percolation, and eventual distillation of legal principles. The members of this bar do not believe that a five member court can fulfill this important function of the common law aspects of the Social Security law.

The importance of a broad judiciary participating in the disposition of these cases is born out by statistical analysis. A sampling from West's Social Security Reporting Service demonstrates that the Courts of Appeal publish 10 to 20 Social Security dispositions each month. Lexis reports that almost 400 cases discuss Social Security Disability were decided in 1992 by the Courts of Appeal. Lexis reports that 700 cases discuss Social Security. A 5 judge court would have 10 separate compositions of 3 judge panels. Each judge would sit on 6 of these panels. Assuming an annual case load of 600 cases for a "Social Security Court", each panel would have to dispose of 60 cases per year, and each judge would have to participate in the disposition of 360 cases per year. This would stretch the resources of quality appellate work too thin. Given the wide diversity of cases, society is better served by having a diverse judiciary decide the cases.

Conclusion

The Los Angeles County Bar Association, Social Security Section views the proposed Social Security Court of Appeals with great alarm. We feel that the stated goal to be achieved - uniformity - is scant reason to deny people their right to a dynamic judiciary. A better manner to achieve uniformity would be to direct Social Security to fairly apply its regulations in a manner which is consistent with the law.

DATED: November 3, 1993

Respectfully submitted,

JOEL D. LEIDNER
Legislative Aide
Social Security Section,
Los Angeles County Bar Association

STATEMENT IN OPPOSITION TO H.R. 3265,
A BILL TO CREATE A SOCIAL SECURITY COURT OF APPEALS

I. I offer this statement in opposition to H.R. 3265. I am engaged in the full-time practice of law in South Carolina and frequently handle Social Security disability appeals administratively and judicially. My statements and recommendations are basèd on 22 years of experience in handling Social Security cases.

II. H.R. 3265 would abolish the existing appeals review available to SSI and Title II disability recipients who may currently have their cases independently reviewed in federal court. Very few Social Security disability claims ever make their way to an appeals court. Applicants who are dissatisfied with an administrative decision may currently appeal to the district court. Dissatisfaction with a district court decision can be appealed to the appropriate federal circuit. H.R. 3265 would significantly impair the capacity of any citizen dissatisfied with a district court decision who might desire appellate review. The new Social Security appeals court would be located in Washington, D.C. Title II and SSI disability applicants simply do not have the economic means throughout all 50 states to deal with a court located in Washington. This would create an economic impediment to judicial review. It appears, however, that it would create a controlled form of appellate review for the government which has been dissatisfied with the large number of reversals that occur throughout the United States when administrative decisions are reviewed by district court judges. This new Social Security appeals court will do nothing to assist the average American citizen in seeking review of administrative determinations in federal court.

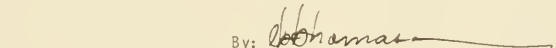
III. The existing 12 federal circuit courts of appeal provide a highly qualified resource for the review of unfavorable district court decisions issued in Social Security litigation. There is no valid economic need for the creation of a single appeals court dealing with Social Security and SSI claims in Washington, D.C. We have an existing competent appellate judiciary in place to review the relatively few cases that work themselves into the appellate review system. There is no economic justification for the costs of a court, courtroom, judicial salaries, clerks, libraries, and travel. There is also no valid need for creation of a single appeals court because of the complexity of Social Security and SSI claims. They are not that complicated. The existing circuit courts of appeal are exceptionally well qualified to handle appeals of these cases.

IV. The stated purpose of such a court would be "to articulate a consistent body of case law and to eliminate regional discrepancies in SSA policy." Such a court already exists which resolves inconsistency in case law--it is the United States Supreme Court. If there are "regional discrepancies in SSA policy" then any discrepancies of any consequence would be resolved by the United States Supreme Court. We do not need another specialty court.

V. For at least 22 years, I have been familiar with Social Security's extreme dissatisfaction with independent judicial review available to SSI and Title II disability recipients in district court. This independent review should not be changed simply because of agency dissatisfaction with its win/loss ratio in 12 circuit courts of appeal. Court review has served the American public well. Nothing should be done to alter the existing judicial review available in Social Security disability claims because of Social Security's dissatisfaction.

Respectfully submitted,

THOMASON & FRENCH

By: 

George H. Thomason
Attorney at Law
P. O. Box 772
Spartanburg, S. C. 29304
803/582-5857
FAX 803/582-5853

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